FILE COPY.

Office Supreme Court U. S.
FILED
OCT 23 1903
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY.. .. .. ..*Plaintiff in Error.*

v. No. ~~359~~ 68

WILL HOLLOWAY.. .. ..*Defendant in Error.*

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Brief for Plaintiff in Error.

EDWARD B. PEIRCE,
Attorney for Plaintiff in Error.

ARKANSAS DEMOCRAT CO., LITTLE ROCK.

Supreme Court of the United States

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY.. .. ..*Plaintiff in Error.*

v. **No. 352**

WILL HOLLOWAY.. .. ..*Defendant in Error.*

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Brief for Plaintiff in Error.

This case was originally instituted in the Circuit Court of Lonoke County, Arkansas, and removed by the plaintiff in error to the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, on the ground of the Federal character of the defendant corporation (Tr., pp. 5, 6, 7).

The original complaint (Tr., p. 3) filed by the defendant in error was as follows:

"On this day comes the plaintiff, W. H. Holloway, and for cause of complaint herein, states that on the 30th day of October, 1900, he was employed by the defendant company

as a fireman, and was then engaged in his duties as such fireman; that on the night of said day he and one W. H. Davis, who was employed by said defendant company as an engineer, were at Brinkley, Monroe County, Ark., and while there the said W. H. Davis and the plaintiff received orders from their superior officer, the chief night dispatcher of defendant company at Little Rock, Ark., at about 11 o'clock at night, directing them to back up the switch engine No. 3 from Brinkley east to Hulbert, a distance of about fifty-eight miles; that upon receiving said orders, they immediately requested that they be permitted to reverse or turn the said switch engine so that the headlight would be in front and they would thereby be enabled to run the same with greater safety, but his request was refused and they were directed by said chief night dispatcher at Little Rock, Ark., to back said switch engine down to Hulbert, a distance of about fifty-eight miles, in the nighttime as aforesaid, when it was dark; that in obedience to such orders and directions, the said Davis, as engineer, and this plaintiff as fireman, left Brinkley about 11:17 p. m. with said switch engine No. 3, backing the same east in the direction of Hulbert; and in obedience to such directions, they continued to run said switch engine backward until they reached trestle No. 547, a distance of about thirteen miles east of Brinkley, where they ran upon and collided with a horse on said trestle, without fault on their part, and said switch engine was thereby suddenly derailed and the plaintiff was caught between the tank and the engine and was thereby seriously and permanently injured as follows, to-wit:

"Two or more ribs were broken, his kidneys were bruised and lacerated, and there were internal bruises, lacerations and injuries from which he suffered continuous and excruciating pain both in body and mind ever since, and he continues so to suffer; that said broken ribs, bruised and lacerated kidneys and other bruises and lacerations and injuries were all received by him on account of and by reason of the negligence of the defendant company; that said negligence of the defendant company consists in this, to-wit:

"1. In directing the said Davis and this plaintiff to run said switch engine backwards in the nighttime when it was dark.

"2. In not providing for and having a headlight on the back end of said engine.

"3. In not placing a man on the footboard in front of said engine, with a white and red light, as required by the rules of said defendant company, and as required by law.

"4. In not providing for and furnishing said engine with a pilot or cowcatcher.

"5. That said engine was a regular road engine except it had footboards at each end for a man to stand on with lights. It was a square or box engine and did not slope forward and downward so as to give a better view in front of the engine.

"6. That defendant was required by law and under its contract with plaintiff to furnish him with reasonably safe instrumentalities, machinery and appliances with which to do his work as such fireman; and it negligently failed to do so in the particulars above named, and by reason of said failure to perform its duties as above stated, and by reason of its negligence as above stated the plaintiff has suffered the injuries above mentioned and has suffered therefrom long, intense and excruciating pain, both physical and mental, and has thereby been damaged in the sum of $10,000. He further states that the defendant company is a railway corporation organized under the laws of the State of Arkansas and is and was on said date running and operating a railroad in this State through Pulaski, Lonoke and other counties. He further states that by reason of said injuries, caused by the neglect of the defendant as above stated, he has been forced to make a drug and medical bill in the sum of $75; wherefore he prays judgment for the sum of $10,075. and for such other and further relief as he may be entitled to."

On the 29th day of March, 1901, and after the cause had been removed to the United States Circuit Court, the plaintiff in error filed its demurrer to the foregoing complaint on the ground that the same did not state facts sufficient to constitute a cause of action against the defendant (Tr., p. 9).

On the 6th of April following the defendant in error filed an amended and substituted complaint (Tr., pp. 10, 11, 12) as follows:

"On this day comes the plaintiff, Will Holloway, and for amended and substituted complaint herein states that the defendant is a corporation and operates a railroad in this

State, and that on the 27th day of October, 1900, he was employed by the defendant company as a fireman; that on the 29th day of October, 1900, he entered upon his duties as such fireman, and began work for the defendant as such, and that on the 31st day of October, 1900, he was engaged in his duties as such fireman, and that, on the night of said day, while he was so engaged, he and one W. H. Davis, who was employed by said defendant company as an engineer, were at Brinkley, Monroe County, Ark., and while there the said W. H. Davis and the plaintiff received orders from their superior officer, the chief night dispatcher or train master of the defendant company at Little Rock, Ark., who has exclusive control of the movement of all trains and engines, at about 11 o'clock at night, directing them to back up the switch engine No. 3, consisting of an engine and tank or tender, from Brinkley east to Hulbert, a distance of about sixty miles, because engine No. 33 in use at the dirt pit at Hulbert, where quite a number of men were at work repairing the roadbed, was ditched and disabled; that upon receiving said orders they immediately requested that they be permitted to reverse or turn the said switch engine so the headlight would be in front and the tank or tender in the rear, and they would thereby be enabled to run the same with greater safety, but his request was refused, and they were directed by said chief night dispatcher or train master at Little Rock to back said engine down to Hulbert, a distance of about sixty miles, in the nighttime as aforesaid, when it was dark; that in obedience to such orders and directions, the said Davis as engineer, and this plaintiff as fireman, left Brinkley about 11:17 p. m. of the night of October 31, 1900, with said switch engine No. 3, backing the same east in the direction of Hulbert; that in obedience to such directions, they continued to run said switch engine backward until they reached trestle No. 547, a distance of about thirteen miles east of Brinkley, where they ran upon and collided with a horse upon said trestle, without fault upon their part, and said switch engine was thereby suddenly derailed, and the plaintiff was caught between the tank or tender and the engine and was thereby seriously and permanently injured, as follows, to-wit: Two or more ribs were broken, his kidneys were bruised and lacerated and there were internal bruises, lacerations and injuries from which he has suffered continuous and excruciating pain both in mind and body ever since, and he continues so to suffer; that the said broken ribs, bruised and lacerated kidneys and other bruises,

lacerations and injuries were all received by him on account of and by reason of the negligence of the defendant company; that by reason of said injuries he has become permanently disabled, and at that time he was 33 years old, and was earning about $80 per month; that the said negligence of the defendant company consists in this, to-wit:

"1. In directing the said Davis and this plaintiff to run said switch engine, consisting of an engine and tank or tender, backwards in the nighttime when it was dark.

"2. In not providing for and having a headlight on the back of said engine.

"3. In not placing a man on the footboard in front of said engine with a white and red light, as required by the rules of said defendant company, as required by law.

"4. In not providing for and furnishing said engine with a pilot or cowcatcher.

"5. That said engine was a regular road engine except it had footboards at each end for a man to stand on with lights. It was a square or box engine, that is, the tank or tender did not slope forward and downward so as to give a better view in front of the engine.

"6. That the brakes on the engine were out of repair and could not be worked or used at the time of the injury aforesaid, that is to say, when the air was applied to the brakes, those on the tank or tender in front of engine, that is, east of the engine, were in good working condition and the shoes of the brakes clasped the wheels of the tank or tender while the brakes on the engine were not in a condition to work, the same being out of repair and the shoes could not be made to clasp the wheels and thereby stop the engine; in fact, there were no shoes on the brakes of the engine, and when the engineer discovered the horse on the track he immediately applied air to the brakes so as to stop the engine and tank or tender as soon as possible; the brakes were successfully applied to the wheels of the tank or tender, but the brakes on the engine being out of repair could not be worked, and the shoes of said brakes, if any, could not be made to clasp the wheels; that the effect of applying the air to the brakes as aforesaid was to stop the tank or tender in front or east of the engine, and it had no effect whatever on the engine, thus the engine was forced with all its weight and momentum upon and against the tank or tender thereby bending the goose-neck and breaking the draft castings between the engine and tank or tender, which were also defective and out of repair, and bringing the ends of the

engine and tank or tender closer together, and as the plaintiff was attempting to escape by going out between the ends of the engine and tank or tender he was caught between the same and thereby injured as aforesaid; that he had only been on said engine for a few hours and knew nothing of the dangerous condition of the brakes.

"7. That defendant was required by law and under its contract with plaintiff to furnish him with reasonably safe instrumentalities, machinery and appliances, with which to do his work as such fireman, and with a reasonably safe place to perform such work, and it had failed so to do in the particulars above named, and by reason of said failure to perform its duties as above stated, and by reason of its negligence above stated, the plaintiff has suffered the injuries above mentioned, and has suffered therefrom long, intense and excruciating pain, both physical and mental, and has thereby been damaged in the sum of $10,000.

"He further states that by reason of said injuries caused by the neglect of the defendant as above stated that he has been forced to make a medical and doctor's bill in the sum of about $150.

"Wherefore, he prays judgment for the sum of $10,000 on account of said injuries, and the sum of $150 for his medical and doctor's bill, and for such other and further relief as he may be entitled to."

The answer (Tr., pp. 13, 14) specifically denied each of the material allegations of the complaint and set up as a further defense that the plaintiff was guilty of contributory negligence, and that his injury was occasioned by his own carelessness and negligence and without any fault on the part of the defendant, and that the injury received by plaintiff was the result of a risk assumed by said plaintiff, and for which defendant was in no respect liable to plaintiff.

ASSIGNMENT OF ERRORS.

The plaintiff in error relies upon the following errors for the reversal of this case (Tr., pp. 105-111):

First. The verdict of the jury is contrary to the evidence.

Second. The verdict of the jury is contrary to the instructions of the court.

Third. The verdict of the jury is contrary to the evidence and the instructions of the court.

Fourth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"In examining it, you will go inside and try to put yourself only in the same place that the fireman would naturally occupy, and then, occupying that place, you are to determine whether the wheels of the engine on which the brakes would be can be seen from there without looking for them, while a man is employed several hours doing work on the engine as a fireman, *i. e.*, whether he could easily see them by just keeping his eyes open."

Fifth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"Now the court will tell you that it is not the duty of the fireman, when machinery is furnished him, to look over it and examine it carefully to see whether everything is in perfect order, because the law makes it the duty of the employer, whether it is a railroad or whether it is a saw-mill man, or whether it is any other kind of manufacturing plant, to furnish him with reasonably safe appliances, and the employee has the right to rely upon that fact, without any examination made by himself, that the company did furnish him reasonably safe machinery, and that it had been examined by inspectors and the proper officers of the company before it was turned over to them, except where it is

defective, and his attention has been called to the defect, and for that reason he was told that they want it taken to the shops, or 'you must be careful with it, because there are certain defects in this machinery.' If these are pointed out to him, then he assumes the risk, if he goes on it."

Sixth. The court erred in giving that part of its charge to the jury in words as follows:

"Without hunting for it."

Seventh. The court erred in giving that part of its charge to the jury in words and figures as follows:

"Now, you gentlemen of the jury, when you go down there to make an examination, you are to examine it, not for the purpose of hunting for it, straining your necks, and looking out to see whether you could find out and ascertain the fact that there were no brakes, but to try to put yourself in the position that this man must have been in, during his ride from Hulbert to Brinkley, and if by simply discharging his duty as a fireman, he was bound to have noticed it, then the law supposes that he had notice of it."

Eighth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"If in getting off and on, and working and firing for six hours, as any reasonably prudent person would have noticed it, then you are to consider that fact. If, on the other hand, a man could not have noticed it, who was a fireman, by getting on and off and then attending to his duty and business, as the evidence shows plaintiff is, you may reach another conclusion."

Ninth. The court erred in refusing to give instruction No. 1, asked by the defendant, in words and figures as follows:

"The court instructs the jury that under the evidence in this case, the plaintiff cannot recover, and your verdict will be for defendant."

Tenth. The court erred in refusing to give instruction No. 2, asked by defendant, in words and figures as follows:

"The court instructs the jury that the fact that there were no brakes on the driving wheels of the engine, if a defect at all, was a patent or obvious defect, of which the plaintiff is presumed to have had knowledge."

Eleventh. The court erred in refusing to give instruction No. 4, asked by defendant, in words and figures as follows:

"If the jury believe from the evidence that the plaintiff by his own negligence directly contributed, in any degree, to the injury sued for, you will find for the defendant."

Twelfth. The court erred in refusing to give instruction No. 5, asked by defendant, in words and figures as follows:

"The court instructs the jury that if they find from the evidence that riding upon an engine with the tender forward, without any headlight upon the same, and without a cowcatcher, was a dangerous method of riding, so far as obstructions on the track or roadbed were concerned, and the plaintiff knew it, or had reasonable cause to know it, then the plaintiff would be guilty of contributory negligence, and cannot recover; and that, too, regardless of whether the engine was defective in not having brakes on the driving wheels of the engine, and regardless of whether the plaintiff had knowledge of the fact or not that there were no brakes on the driving wheels of the engine."

Thirteenth. The court erred in refusing to give instruction No. 6, asked by defendant, in words and figures as follows:

"The court instructs the jury that if they find from the evidence that it was dangerous to ride upon an engine running backwards, as this engine was, and the plaintiff knew it, or had reasonable cause to know it, then the plaintiff would be guilty of contributory negligence and cannot recover."

Fourteenth. The court erred in refusing to give instruction No. 7, asked by defendant, in words and figures as follows:

"The court instructs the jury that if they find from the evidence that it was dangerous to travel upon an engine backwards, as the proof shows his engine was running, and the plaintiff knew it, or had reasonable cause to know it, then the plaintiff assumed the risk of riding there and cannot recover; and that, too, regardless of whether any other or safer place was provided for the plaintiff to ride, or regardless of whether he was directed by the defendant so to ride."

Fifteenth. The court erred in refusing to give instruction No. 8, asked by the defendant, in words and figures as follows:

"The court instructs the jury that an employee is required to observe patent defects in the machinery about which he is employed, and is bound to assume the risk incident thereto to the same extent as if their existence had been within his actual knowledge."

Sixteenth. The court erred in refusing to give instruction No. 9, asked by defendant, in words and figures as follows:

"The court instructs the jury that a servant is bound to take reasonable care and make reasonable effort to discover any dangers and defects in the place and machinery in which and with which he is to work, and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him."

Seventeenth. The court erred in refusing to give instruction No. 10, asked by defendant, in words and figures as follows:

"You are instructed that if, before leaving Brinkley, the plaintiff could, by using ordinary care and diligence on his part, have informed himself as to the condition of said engine as to brakes, and if he failed to do so, and an ordinarily prudent man under like circumstances would have done so, then his failure to take such precautions was negligence on his part, and will bar his recovery in this case; and in determining this question, you may take into consideration the fact that plaintiff was starting on a trip which he knew to be hazardous, the further fact that he had been told that the engine was out of repair, and was to go to the work shop to be overhauled, and all other facts and circumstances surrounding the case."

Eighteenth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"The railroad company is not an insurer of its employees; all that is required of it by the laws of the

country is to furnish its employees working tools which are reasonably safe, and a place to work in which is reasonably safe. If it does that, then it has discharged its duty, and in case of accident to one of its employees it is not liable for the injuries sustained by him. On the other hand, if it has not provided the employee with tools reasonably safe, and a reasonably safe place to work in, and by reason of those facts the servant is injured, and that without any fault or negligence on his part, it is liable for such injuries.

Nineteenth. The court erred in giving that part of its charge to the jury in words and figures as follows:

" Negligence in cases of this kind consist of the failure of the employer to provide the servant with machinery reasonably safe and suitable for his work. But even if that is shown, if the evidence also shows that the employee knew of the defect in the machinery from which the injury resulted, yet with such knowledge he remained in the service and continued the use of the machinery, without giving any notice thereof to the employer, the law deems him to have assumed the risk of all danger reasonably to be apprehended from such use, and he cannot recover, although he may have been injured very severely."

Twentieth. The court erred in giving that part of the charge to the jury in words and figures as follows:

"The plaintiff in his complaint sets out various acts of the defendant as causes of the accident complained of, but I charge you that, from the evidence introduced at this trial, and that is all you are to consider in determining what your verdict shall be, the only thing which you are to consider and determine is whether the fact that the locomotive, on

which plaintiff was fireman at the time of the alleged injuries sustained by him, was not supplied with proper brakes and brakeshoes on the engine, was known to the plaintiff or not, or was so obvious that a reasonably prudent man, a railroad fireman of as many years experience as plaintiff admits to have had, must have known of the danger of riding on it, while running backward, without headlight or other light in front of it, on such a night as the evidence shows the night the accident occurred was, would not have made a trip on it as a fireman. If you find that plaintiff did know this fact, or by the exercise of such diligence as a reasonably prudent person, under all the circumstances, should have known that fact, he cannot recover in this action, no matter how seriously he was injured, and your verdict should be for the defendant."

Twenty-first. The court erred in giving that part of its charge to the jury in words and figures as follows:

"That this engine was in bad condition and was to be taken by the plaintiff and his engineer to the shops of the defendant, in order that it might be repaired, is admitted, but he claims that he did not know that there were no brakes on the engine. On the other hand, the defendant has introduced evidence tending to show that the want of brakes on the engine was so obvious that a man with the experience of plaintiff as a railroad man, or even a man with much less experience, if the least reasonably prudent, was bound to have noticed it, especially after riding on it and acting as fireman for a trip of fifty-eight to sixty miles. This is a question of fact, which must be determined by you from the evidence in this case, free from any bias, prejudice or

sympathy. If your finding is that the plaintiff did know it, or as a reasonably prudent man should have known that there were no brakes on the engine, yet with knowledge of that fact he undertook the trip, then he cannot recover, and your verdict should be for the defendant, without considering anything more."

Twenty-second. The court erred in giving that part of its charge to the jury in words and figures as follows:

"In this connection, I want to say to you also that a fireman need not examine an engine or locomotive furnished him by the company to ascertain whether it is reasonably safe. As it is the duty of the company to furnish him with reasonably safe machinery, he has a right to suppose that the locomotive furnished him by the company had been inspected and found reasonably safe, unless informed that it was not; at the same time, he cannot close his eyes to obvious defects, and will be charged with knowledge of such defects if they were patent and apparent to a man who for a number of years had been a locomotive fireman."

Twenty-third. The court erred in giving that part of its charge to the jury in words and figures as follows:

"On this issue the evidence is conflicting."

Twenty-fourth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"If you find that the fact of the engine being without brakes was unknown to the plaintiff and could not have been known to him by the exercise of reasonable diligence under the circumstances of this case, as shown by the evidence, and that if the engine had proper brakes the accident would not have happened, then your verdict should be for the plaintiff."

Twenty-fifth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"The measure of damages, if your finding is for the plaintiff, would be first, the expenses necessarily incurred by him for medical attendance in trying to get cured from the injuries received in this accident."

Twenty-sixth. The court erred in giving that part of its charge to the jury in words and figures as follows:

"Next, the loss of wages during the time he has, by reason of these injuries, been incapacitated from doing any work; next, if the jury find from the evidence that the plaintiff, by reason of these injuries, will not be able to do the work and earn the money he could have earned if he had not been injured, to allow him as a compensation the difference between what he would have earned if uninjured and what they think he will earn in his present condition, making such allowance for such time hereafter as in your judgment, based upon the evidence, you think he will be incapacitated entirely or partially from working or earning as much as he would without the injuries sustained by the accident."

Twenty-seventh. The court erred in not directing the jury to bring in a verdict for the defendant, because the record shows that the whole evidence was insufficient, under the law, to support the allegations of the complaint.

In the Circuit Court of Appeals it was assigned as error that the court erred in not sustaining each of the foregoing assignments of error, and in addition erred (1) in making the order affirming the judgment, and (2) in not sustaining the writ of error and not reversing the judgment of the circuit court (Tr., pp. 128, 133).

STATEMENT OF THE FACTS.

The defendant in error was employed by the plaintiff in error as a locomotive fireman. He was an experienced fireman, and in addition had worked in the locomotive, mechanical, truck and tank departments of railroads, and had also been a brakeman. On the morning of the 29th of October, 1900, he was called at 1 o'clock to leave at 2 o'clock as fireman on C., O. & G. Engine No. 33. The engine did not go out at 2 o'clock, but left at about 3 or 3:30 o'clock in the morning and arrived at Brinkley between 11 and 12 o'clock. There he remained until the next morning about 5 o'clock, when he left on his engine and arrived at Hulbert about noon on the 30th. Upon the arrival of the engine at Hulbert he and his engineer were immediately transferred to W. & B. Engine No. 3 (being the engine upon which the accident complained of, later occurred), with directions to bring said engine to Little Rock for a general overhauling. This engine left Hulbert about 1 o'clock in the afternoon and arrived at Brinkley about 7:20 that evening. In the meantime, the engine used in the pit at Hulbert gave out and it was decided to have this engine, No. 3, return from Brinkley to Hulbert to take the place of the disabled engine at Hulbert. The engine started on its return trip from Brinkley to Hulbert at about 11 o'clock at night, backing up, that is, with the tender forward, without any light on the tender, upon a dark, misty night, and after it had gone about twelve or thirteen miles it collided with a horse on a trestle, the tender of the engine was derailed, and Holloway claims to have received the injuries complained of in this action. He sued for $10,150, and upon trial the jury rendered a verdict in his favor for $1,600.

BRIEF.

I.

The ninth assignment of error is based upon the refusal of the court at the conclusion of the testimony to direct a verdict in favor of the defendant. In the discussion which we propose to make upon the action of the court in that respect, we might also properly include the first, second, third, tenth and twenty-seventh assignments of error.

It will be observed that there was an original and an amended complaint filed in this action. To the original complaint a demurrer was interposed, which was practically conceded by the defendant in error by the filing of an amended complaint, which amended complaint undertakes to make new charges of negligence, and embraced the only charge upon which the case was finally submitted to the jury by the court.

The charge of negligence submitted to the jury was stated in the complaint as follows:

"Sixth. That the brakes on the engine were out of repair and could not be worked or used at the time of the injury aforesaid, that is to say, when the air was applied to the brakes, those on the tank or tender in front of the engine, that is, east of the engine, were in good working condition and the shoes of the brakes clasped the wheels of the tank or tender while the brakes on the engine were not in a condition to work, the same being out of repair and the shoes could not be made to clasp the wheels and thereby stop the engine; in fact, there were no shoes on the brakes of the engine, and when the engineer discovered the horse on the track he immediately applied air to the brakes so as to stop the engine and tank or tender as soon as possible; the brakes were successfully applied to the wheels of the tank or tender, but

the brakes on the engine being out of repair could not be worked, and the shoes of said brakes, if any, could not be made to clasp the wheels; that the effect of applying the air to the brakes as aforesaid was to stop the tank or tender, in front or east of the engine, and it had no effect whatever on the engine, thus the engine was forced with all its weight and momentum upon and against the tank or tender, thereby bending the goose-neck and breaking the draft castings between the engine and tank or tender, which were also defective and out of repair, and bringing the ends of the engine and tank or tender close together, and as the plaintiff was attempting to escape by going out between the ends of the engine and tank or tender, he was caught between the same and thereby injured as aforesaid; that he had only been on said engine for a few hours and knew nothing of the dangerous condition of the brakes."

It will be observed that the allegation of the complaint in respect to these brakes is a little peculiar. It states "that the shoes could not be made to clasp the wheels," and then states "in fact, there were no shoes on the brakes of the engine."

The answer denies the allegations as to the defective brakes, and alleges the fact to be that there were no brakes at all on the engine.

The court submitted the question to the jury in the following language:

"The plaintiff in his complaint sets out various acts of the defendant as causes of the accident complained of, but I charge you that from the evidence introduced at this trial, and that is all that you can consider in determining what your verdict shall be, the only thing you are to consider and determine is whether the fact that the locomotive, on which plaintiff was fireman at the time the alleged injuries were sustained, was not supplied with proper brakes and brakeshoes on the engine, was known to the plaintiff or not, or was so obvious that a reasonably prudent man, a railroad fireman of as many years experience as plaintiff admits to have had, must have known of the danger of riding on it, while running backward, without any headlight or other

light in front of it, on such a night as the evidence shows the night the accident occurred was, would not have made the trip on it as a fireman. If you find that plaintiff did know this fact, or by the exercise of such diligence as a reasonably prudent person under all the circumstances should have known the fact, he cannot recover in this action, no matter how seriously he was injured, and your verdict should be for the defendant.

"That this engine was in bad condition and was to be taken by the plaintiff and his engineer to the shops of the defendant in order that it might be repaired, is admitted, but he claims that he did not know that there were no brakes on the engine. On the other hand, the defendant has introduced evidence tending to show that the want of brakes on the engine was so obvious that a man of the experience of plaintiff as a railroad man, or even a man of much less experience, if the least reasonably prudent, was bound to have noticed it, especially after riding on it and acting as fireman for a trip of fifty-eight or sixty miles. * * * Now, the next fact to be determined by you, if you find this issue of knowledge of the condition of the engine against the defendant, is whether the accident from which plaintiff received his alleged injuries was caused by reason of want of brakes on the engine. For if the accident would not have been prevented even if there had been suitable brakes on the engine, then the plaintiff cannot recover anything in this action, and your verdict should be for the defendant. On this issue the evidence is conflicting. Only two persons were present at the time the accident happened, the plaintiff and Davis, the engineer.

"The plaintiff testified that, while he did not see the horse that caused the accident, the engineer called to him, 'Lookout, lookout;' that this exclamation of the engineer was made long enough before the horse was struck to have stopped the engine had it been supplied with proper brakes, but having no brakes on the engine the failure to stop the engine as rapidly as could have been done if supplied with brakes caused the accident whereby plaintiff was injured. On the other hand, the engineer testified that he did not see the horse until after the engine had struck it and had been derailed. It is for you to determine which of the testimony is to be believed. To do so, you are to take into consideration all the circumstances existing at the time; the kind of night it was; the fact that the locomotive was running backward; that there was no light in front; that the engineer

kept as good a lookout as was possible; also the interest of each witness in the result of this suit, and all other facts which as sensible men you would consider in a matter of importance concerning yourselves, including the fact whether even if there had been brakes, the engine could have been stopped before striking the horse after its presence in the track had been discovered by the engineer.

"If you find that the fact of the engine being without brakes was unknown to the plaintiff and could not have been known to him by the exercise of reasonable diligence under the circumstances of the case, as shown by the evidence, and that if the engine had proper brakes the accident would not have happened, then your verdict should be for the plaintiff, but if you find either of these facts the other way your verdict should be for the defendant."

Now, it occurs to us that the court submitted the case upon a theory not contemplated by, and wholly inconsistent with, the complaint. The complaint in the beginning stated that they ran upon and collided with a horse upon said trestle *without fault upon the part of either the fireman or the engineer*, and does not charge any negligence as to the presence of the horse on the track, and in fact, the court instructed the jury that the presence of the horse on the track could not be imputed to the railroad company as negligence. The complaint did not charge that if the engine had been supplied with brakes that the collision with the horse could have been avoided, but, in fact, states that the collision with the horse was without fault of either the engineer or the fireman, but states that when the brakes were successfully applied to the tender and the tender stopped, that the engine, being without brakes, was forced upon the tender with such momentum that the ends of the tank or tender and the engine were brought close together and he was caught while trying to get out. Now, we do not think that there is

any question of negligence stated, either in the complaint or contained in the proposition as submitted by the court to the jury. *It is nowhere charged that it was negligence on the part of the railroad company to operate an engine on its road without brakes upon the engine as well as upon the tank. Nor is there any evidence to that effect.* Furthermore if there had been a charge that it was negligence to operate an engine with brakes on the tank or tender and no brakes upon the engine, and there had been any evidence to sustain the allegation, still it cannot be imputed to the railroad company as negligence, because there was no charge or evidence that such an accident could have been foreseen or reasonably anticipated as the probable result of operating an engine so equipped; not only was there a failure to charge this, but no such question was submitted to the jury for their determination, and there was absolutely no proof anywhere offered to show that an injury of this kind could have been reasonably anticipated from operating an engine in this way; this is especially important in this case, for the reason that the court found, as a matter of law, from the evidence, that there was no defect in the goose-neck or the draft castings, which the plaintiff charged were defective, and instructed the jury that they were not to consider any defect in that respect at all, and it is also especially important in this case, for we know of no rule of law or mechanics by which the actions of a railroad engine in a collision can be foreseen.

Ry. *v.* Elliot, 55 Fed. Rep., 949.
Motey *v.* Pickle Marble & Granite Co., 74 Fed. Rep., 155.

But waiving these considerations for the time being, we will now proceed to examine the record to see if there was any reason to submit the case to the jury, either upon the theory contained in the complaint or the theory contained in the charge to the jury.

Plaintiff is chargeable with knowledge that there were no brakes on engine.

As we have already pointed out, the plaintiff says the brake shoes did not clasp the wheels of the engine and then says there were no brake shoes. The record seems to us very clear that there were no brakes on the engine at all, and not only that, but that defendant in error must have known that fact.

WILL HOLLOWAY testified (Tr., p. 39):

"Q. You say the engine had no brakes on it; when did you first find out that the engine had no brakes on it?

A. After we were into the wreck.

Q. Did you know that the engine had no brakes on it when you were ordered to go back with it?

A. *No, sir, I have no right to inspect an engine; I am no engine inspector;* I am a locomotive fireman.

Q. When was your attention first called to the fact that the shoes were not at work on the wheels?

A. Why, after she went down there and didn't stop, after he applied is air, she rolled down, and I got off and told him none of these shoes ever clasped the wheels; he said no.

Q. Did you know at that time there were no brakes on the engine at all?

A. No, sir, I didn't know it until I read it in the answer to our complaint. That was the first I knew of it at all."

On transcript, page 37, he testified:

Q. You allege in your complaint here that the tank was equipped with brakes?

A. The tank was, yes, sir.

Q. And you allege that the brakes on the tank were in perfect condition, don't you?

A. Yes, sir.

Q. Now, do you undertake to say that you can ride on an engine from Hulbert to Brinkley and not tell whether there are any brakes on the driving wheels?

A. *Yes, sir, I didn't pay any attention to it.* I have got all I can do when I fire a locomotive to attend to my business, without looking after the engineer's.

Q. When you are firing, what do you look after?

A. I look after my coal, water and lights.

Q. You don't look at anything?

A. *I have got no business knowing any machinery at all, because I am not an engine inspector.*

(In connection with this answer, we desire to call the court's attention to the following rule (Tr., p. 92):

"200. Every person accepting a position with this company does so with the full knowledge of the dangers incident to the operating of railroads, and is required to exercise great care in the performance of his duties, to prevent accident to himself or others, and to see that the machinery or tools which he is to use are in a safe condition to perform the services required and to report defects as per rule 203.")

Q. You just close your eyes to everything else?

A. No, sir, I did not.

Q. So far as anything else, you just close your eyes?

A. *Yes, sir, so far as his work is concerned, it is nothing to me.*

On transcript, page 38, he testified:

Q. Well, I will ask you, Mr. Holloway, if there were no brakes on that engine, if that is not a perfectly apparent fact? Where are the brakes located on an engine?

A. Where it is a ten wheeler, they are located on the front.

Q. Well, we are talking about this engine, if it was a ten wheeler or twenty wheeler, or more?

A. Well, this was a ten wheeler; she has three drivers on either side. The brakes are located between the two drivers just that way, one applies to each side here, and on the other side the same way.

Q. *They can be seen perfectly when they are there?*

A. *Yes, sir, they can be seen.*

Q. *It is open to the eyes if you look?*

A. *If a man is on the ground, he can see whether they are there or not.*

Q. *If he is walking up to the engine to get on it, and he looks, he can see?*

A. *Yes, sir.*

Q. *Perfectly plain?*

A. *Yes, sir.*

Q. So you state now that if the air is applied to the tank, that it wouldn't make the engine sort of jump forward?

A. The weight of the engine is so much greater than that of the tank that it would drag it along perfectly still.

Q. When did you say you first made this discovery about the brakes?

A. There at the wreck, where we had the smash-up.

Q. Didn't you allege a defect in the brakes?

A. Yes, sir, I said there was a defect in them, *I suppose so.*

Q. Where did you tell Mr. House just now that you made that discovery?

A. Right there at the wreck.

Q. Did you examine it then to see?

A. Yes, sir, I examined to see what was the matter with the whole outfit.

Q. Now, Mr. Holloway, if there were no brakes on that engine, why would you allege in your amended complaint that the shoes didn't work?

A. Because they didn't work, or were not working at that time.

Q. There wasn't any brakes on there at all?

A. Yes, sir, the brakes were on there.

Q. The brakes were on there?

A. Yes, sir, and hung very low, didn't clear the rail more than an inch and a half after we pulled her back on the track.

Q. Then, why do you allege in your complaint that there wasn't any brakes?

A. There was no air connection.

Q. *You allege in your complaint in the first place that the brakes were defective?*

A. *Supposed to be.*

Q. Then, there was an answer filed, in which it was stated that there were no brakes at all on the engine, and then you come back in your complaint and stated that the shoes were defective, if there were any brakes there at all?

Q. *You say the shoes were on there?*

A. *I don't remember about the shoes.* The brakes were on there.

Q. You are certain of that?

A. Yes, sir, I am certain of that.

Court: Q. Can the brakes do anything without shoes on to catch the wheel?

A. If it is up tight enough, yes, sir. Of course, the shoe binds and locks.

Q. The brakes cannot do anything without shoes?

A. They are not successful, no, sir, but I say you can tighten them up until the brakes will catch.

Q. If there are no shoes on there, it cannot catch?

A. Yes, sir, the brake will catch without a shoe.

Q. But it won't do any good?

A. It will have a tendency to hold as much as it will, but not as much as a shoe, because a shoe is a great deal longer. A shoe is about that length."

On page 41 of the transcript is found the personal injury report made out and signed by Holloway after the accident, to which we invite the court's especial attention.

It will be noted that the thirteenth question asked if there was any defect in track, bridges, buildings, rolling stock, machinery, tools, or other appliances that caused, or may have assisted in causing the injury? And if so, state fully? To that question defendant in error made no answer, which may be taken as affirmatively stating that there were no defects, especially in view of his answer to question fifteen, which was: "In your opinion what further precaution could have been taken by the person injured, or by anyone in any way?" to which he answered: "The company should have had a headlight on the back end of engine, also a competent man to look out for danger." Also to question nineteen, which was: "What does injured person say was cause of accident?" to which he answered: "Horse being in trestle;" and also question twenty-one, which was: "In

your opinion was any employee at fault; if so, who and in what way?" to which he answered: "Chief dispatcher;" and also question twenty-three, which was: "Was anyone at fault; if so, who?" to which he answered: "Yes, the company for backing engine without headlight." As to whether his failure to say anything about the brakes in this report or his failure to charge it in his original complaint has any significance, we leave it to the court to say.

Transcript, page 53, he testified as follows:

"Q. Now, at the time you made this complaint, you stated here that the brakes were defective and they wouldn't work. Now, I will ask you *to what extent your attention was called to brakes that night that gave you this information?*

A. *No more than just merely passing by.*

Q. Did you notice the shoes?

A. *Why, I don't remember whether there were shoes. It seems to me there were shoes on the brakes, but it might be possible I may be mistaken about that.*

Q. Did these shoes when the air was turned on clasp the wheel?

A. Yes, sir.

Q. I mean that night?

A. No, sir; there wasn't nothing clasped these wheels at all.

Q. If the engine had been properly equipped with brakes, and the air in condition with the air turned on, would the effect of that be to clasp these shoes on the wheels?

A. Yes, sir.

Q. Now, you say the night of the injury, when the air was turned on, these shoes, if they were on there at all, didn't clasp the brakes?

A. No, sir; they didn't clasp them.

Q. You stated this morning also that you had no occasion, it was not a part of your duty as a fireman, to look after the brakes?

A. No, sir; it is in no ways connected with my affairs at all."

Transcript, page 54, he testified as follows:

"Q. Explain about these shoes, how they are made, so that these gentlemen can understand how the shoes are made to operate on the wheel?

A. The shoes are very large and very heavy; they are something like that long, and I suppose about five inches wide, and say 2½ or 3 feet long, and they are in the shape of the wheel, and there is a plunger that works from the air valve down and throws each brake to its wheel.

Q. These shoes are made in a semicircular shape, and when the air is applied the shoes are clasped right around the wheel?

A. Yes, sir; perfectly tight.

Q. How many wheels did this engine have on each side?

A. Three drivers on each side.

Q. You mean the large wheels?

A. Yes, sir; three large wheels.

Q. These small wheels, what part of the engine are these?

A. The pony trucks."

Transcript, page 55, he testified as follows:

"Q. Now, Mr. Holloway, you say that the brakes didn't clasp this night? How do you know they didn't?

A. There was nothing clasped to the wheel.

Q. How do you know they didn't?

A. I passed by the engine with my torch.

Q. Afterwards?

A. Yes, sir; and I didn't see the brakes clasped to the wheel.

Q. If there had been any on there, they would have been released then?

A. No, sir; the air stood right into the emergency, until after everything was out and over with.

Q. You don't remember whether there was any shoes on it at all or not?

A. No, sir; I do not. I am as liable to be mistaken as anybody else, but I think I am right about it."

WILL BARGER, a witness for plaintiff, testified (Tr., p. 56):

"Q. Are you acquainted with engine No. 3 W. & B.?

A. Yes, sir.

Q. Did you ever have occasion to work with it?

A. Yes, sir.

Q. Do you remember the occasion when Mr. Holloway claimed to have been injured by this engine coming in collision with a horse?

A. I don't know what date it was, but I remember the time of the trouble. I heard about it; heard the boys speak of it.

Q. Had you any knowledge of this engine before that injury occurred?

A. Yes, sir.

Q. What was the condition of the brakes of this engine?

A. She had air on her tank, but none on her drivers.

Q. How long before Mr. Holloway got hurt did you know it was in that condition?

A. I don't know just exactly how long; it was quite a little bit, though.

Q. Several weeks, you think?

A. Yes, sir.

Q. Did you work on that engine down there at Hulbert?

A. Yes, sir; we had her in the pit.

Q. Were you fireman or were you brakeman?

A. I was brakeman.

Q. You say at that time that this engine No. 3 W. & B. had no air on its brakes?

A. Had air on the tank.

Q. Had none on the engine. Do you know whether the apparatus or brakes were there, or whether there was any brakes there at all or not?

A. As far as I can remember, I don't think there was. There might have been without my seeing them. I don't think that there was any.

Q. You know there was no air that could be applied to the engine?

A. Not to the engine. There was on the tank."

On cross-examination he testified (Tr., p. 57):

"Q. Don't you know that there wasn't any brakes on the driving wheels of the engine?

A. I couldn't say positively, but I don't think there was.

Q. Aren't you pretty positive that there wasn't any brakes on there?

A. I never did see any.

Q. If there had have been, you could have seen them?

A. Yes, sir.

Q. Can you tell positively? Did that engine at that time have brakes on it?

A. Her air was not connected with the engine. It only had air brakes on the tank.

Q. But that is not the question. Did they have brakes, brake shoes, on the engine?

A. No, sir; there was not.

Q. There was no brakes on the engine?

A. No, sir.

Q. Was any of the rigging or gearing on the engine that the brakes were fastened to?

A. No, sir.

Q. I will ask you if it is possible for a man to ride on the engine from Hulbert to Brinkley over that track, with brakes on the tender and no brakes on the engine, and be ignorant of the fact that there are no brakes on the engine?

A. No, sir.

Q. Just explain to the jury why?

A. Well, if an engine has brakes on her tank and none on her drivers, in making each stop, the tank would hold to the engine, would bump up against her, because it has nothing there to hold the wheels of the engine.

Q. If a man is on an engine, and there are no brakes on the engine, but brakes on the tank, he can tell by the movement of the engine whether there are any brakes on the engine, couldn't he?

A. In stopping, yes, sir.

Q. I will ask you if a good deal of that track is not very rough, so that a man would be more likely to ascertain that fact than not?

A. It was when I was there."

On redirect examination he reiterated that there were no brakes on the driving wheels of the engine, and also that he could tell from the movement of the engine whether there were any brakes on the driving wheels.

On recross-examination and redirect examination (Tr., p. 59) he reiterated the fact that there was none of the appa-

ratus nor brakes on the driving wheels of the engine, and also that he could tell from the movement of the engine whether there were any brakes on the engine or not.

WILL HOLLOWAY, being recalled, testified (Tr., p. 61) that in coming from Hulbert to Brinkley, there was no occasion for stopping the engine in anyway for him to have noticed that there were no brakes on the engine: that the engine was light and they could shut off and stop anywhere.

E. M. ROBERTS testified (Tr., p. 64) that he was foreman of the locomotive and car department at Brinkley. That he was acquainted with White & Black Engine No. 3; that she has only tank brakes on her, that is, on both pair of trucks, what are called two pairs of trucks under her tank. There are air brakes on both pair of trucks on the tank, but there is none at all on the drivers to the engine. There never has been any since it came into his charge two years ago last February. That there were none on it on the 30th day of October, the date of the injury. That brake shoes are about twelve or fourteen inches long, about six inches wide, and about an inch and a quarter or a half thick, and the brake head is about eight inches wide, sets right up in front of the driving wheels, and then there is a brake cylinder that would sit right up under the running board of the cab, with a long lever running out here, and the lever runs down to the brake, so that when you apply the air, it shoves this lever over and applies the brake to the driving wheel. It is very bulky; a man couldn't help but see it if he was to look at it; but this engine had none on it. That he would miss a driver brake on an engine as quick as he would a wheel. It

stands out so it can be plainly and clearly seen. A fireman who had previously had several years' experience could not, he thinks, travel on an engine from Hulbert to Brinkley and from Brinkley back, thirteen or fourteen miles, without knowing whether there were any brakes on the driving wheels or not. If he did; he must have been a very careless fireman to do anything of that kind, not pay any more attention to his engine than that. He could tell by the feel of the engine, the speed of it, whether there was brakes on it or not. That this engine had three driving wheels on each side. That if there had been brakes on it, there would only have been brakes between the two back wheels on the engine, the same as an eight wheel engine. That he put the brakes on the tender the year before the Choctaw leased the White and Black River Road. That he sent and got an air pump new and everything complete, and put it on at Brinkley himself.

We call particular attention to Mr. Roberts's testimony, and ask that the court read it in full as found on pages 64, 65, 66, 67, and 68 of the record.

C. H. WELCH (Tr., p. 69) testified that he was master mechanic of the Choctaw, at Argenta. He stated that he was acquainted with the engine that Holloway was on; that there was no part of the equipment for brakes on the engine. That he did not think it was possible for a man who had had several years' experience as fireman and knows something about building tanks or tenders to ride on an engine from Hulbert to Brinkley and from Brinkley back, fifteen or twenty miles, over that track without knowing that there was brakes on the engine. That the brake is something that is in plain sight

of the fireman and engineer, and is not hidden in any way if it is there. If he looks at the engine at all, he cannot help but see it. It is just as patent as the wheel of an engine.

On cross-examination he testified as follows:

"Q. Now, you say a man could see this brake if he had looked at it; suppose the fireman was riding in the engine at the time, he couldn't see it from where he was acting as fireman, could he?

A. You can see, yes, sir; you can see part of the appliances from the cab of the engine.

Q. You can by looking for it?

A. Yes, sir.

Q. When you say it is obvious where a man goes down and looks around to see whether the brake is there, he would see it?

A. Yes, sir; it is in plain sight.

Q. The main frame of the brakes is under the engines, isn't it?

A. The shoes are right on the face of the driving wheel.

Q. But the balance of the brake is right under the engine, isn't it?

A. No, sir; the rods and the levers are, but the cylinder and fulcrum are outside the frame, if there is a driving brake of the engine.

Q. What you call the shoe comes right over the wheel?

A. Comes on the face of the driving wheel."

We invite the court's attention to the whole of Mr. Welch's testimony, found on pages 69, 70, and 71.

Y. E. WHITMORE testified (Tr., p. 80):

"Q. Mr. Whitmore, are you acquainted with the White & Black Engine No. 3 that went off that night?

A. Well, yes, sir; I looked at the engine after the accident, and I had seen her frequently before that.

Q. Do you know whether or not she had any brakes on the driving wheels?

A. No, sir; I don't believe she had. I am positive she had not.

Q. Now, Mr. Whitmore, I will ask you if a fireman with several years' experience could travel from Hulbert to Brinkley, and part of the way back, without knowing whether an engine had brakes on the driving wheels?

A. No, sir; it is hardly probable that he could; I don't think he could. In fact, the brakes on the locomotive is a very important thing, and anybody that has had five years' experience as a fireman, or in the train service at all, would know whether there was driving brakes on the engine or not, as they are in a very conspicuous place.

Q. Do you think a fireman could, with any considerable experience, or any experience, ride from Hulbert to Brinkley, and part of the way back, and not know whether there were any brakes on the driving wheels?

A. No, sir; I don't think he could.

Q. You say you saw them at Brinkley before they started?

A. Yes, sir.

Q. Were they moving the engine around there any?

A. Yes, sir.

Q. What movements did they make of it? I will just ask you this: Do you know whether Holloway was on the engine moving it or not?

A. He was on the engine, but the engineer was moving the engine.

Q. Moving around in the yard?

A. Yes, sir; moving backward and forward to get out of my way while I was doing some switching there."

On cross-examination he testified as follows:

"Q. You have stated that a fireman wouldn't probably ride on the engine that distance — now, a fireman's duty is to make the fire, isn't it, and look after the fire?

A. Yes, sir; his duty is to look after the fire, and assist the engineer with his duties as much as possible. He takes and accepts the position as a fireman always with the prospects of going further. He accepts the position as a fireman to advance his position in life, and every fireman that you see — the engineer is foreman of the engine; he is the boss, you may say, he is recognized as the head, and the fireman is subject to the engineer's orders, and no fireman could possibly be on an engine, with [illegible] years' experience, that

wouldn't know whether there was a driving brake on the engine or not, at this day and time.

Q. He could see them distinctly, could he?

A. Yes, sir; very distinctly.

Q. Suppose he was riding in the engine, could he see them then?

A. Yes, sir; you can see them if you lean your head out of the cab window six inches, you could see the brakes. More than that, they have a triple valve right underneath the fireman, attached to what is called an auxiliary reservoir, and each time the brake is applied and let off, the air escapes from this triple valve and makes a whistling noise, and in the absence of brakes, that noise is not there.

Q. The absence of brakes anywhere?

A. No, sir; there is a triple valve on both engine and tank, where there are brakes."

WILL HOLLOWAY, plaintiff, being recalled, testified (Tr., p. 85) that it was not possible to see the brakes on the engine by standing in the cab in the fireman's place and looking out in front, and explained that the reason was that there was a long running board commencing near the front end of the engine and running clear back, over and upon which the fireman's seat was situated. That since the witness, Whitmore, had testified that brakes could be seen from the cab, he had made a test on a similar engine and found it was not true.

On cross-examination (Tr., p. 88) he testified:

"Q. Can you see something of the driving wheels sitting in your seat in the cab?

A. You may see the front ones. You may see the third wheel, but I don't think you can see any more than the far edge of the rim of the middle wheel. I never tested that at all. I don't know exactly.

Q. You just sit up there and didn't look to see?

A. *I had no occasion to. I am no engine inspector or engineer. I am a locomotive fireman, and I fill that.*"

This was all the evidence introduced as to the presence or absence of brakes on the driving wheels of the engine, and the gearing and apparatus relating to same. From a reading of this evidence, no reasonable mind can reach any other conclusion than that there were no brakes on the driving wheels of the engine and no part of the appliances necessary in connection therewith. The testimony of Holloway certainly cannot be worth anything, for the reason that he states that he made an examination immediately after the accident to find out what was wrong with the "whole outfit" and he could not at the trial, to save his life, say positively whether there were any shoes on the brakes, which he claimed were there. On the contrary, the master mechanic, who had had charge of this engine for two years, and who testified that he put the brakes on the tank, said positively that there were no shoes or brakes, or any part of the appliances, on the engine. Furthermore, that it would be impossible for a man to ride on the engine without knowing this, for the reason that the appliances occupy very conspicuous places, and Whitmore testified that there was a triple valve right under the seat of the fireman which made a whistling noise whenever the brakes of the engine were applied; that there were triple valves both for the tank and the engine. Holloway rode on this engine from Brinkley to Hulbert, about sixty miles, in the daytime; was on it while it was switching in the yards at Brinkley; had the fullest opportunity for observation after supper when he was getting the engine ready to go out, and rode back for about fifteen miles, and he does not even undertake to say that during all that time he saw any of the appliances necessary for brakes on the engine.

But suppose we resolve the doubt in favor of Holloway and say that there were appliances on the engine for these brakes, no negligence can be imputed to the company. He says he cannot say positively whether there were shoes on the brakes to the driving wheels or not, and if there was he nowhere says positively that they were defective. He says that after he got out of the engine that he examined to see and the shoes did not clasp the wheels, but this does not argue anything or tend to establish negligence, for the reason that the engine had already been derailed, and as we said in the beginning of this brief, there is no law governing the action of machinery in cases of a collision or wreck, and it would be more than likely that these shoes by the shock of the collision would be thrown from their places, or it is possible might have been torn off altogether. You may take an engine in the most perfect condition and with the latest and best appliances, and if you run it into another engine, you certainly cannot expect to find all of its pieces there or in perfect shape, so that we say that this evidence shows conclusively, in the first place, that there were no brakes on this engine, and could not be defective; in the second place, that Holloway could not have been on this engine during all of this time without discovering this fact; and third, that if it is true that there were brakes on it, there is not a scintilla of evidence from the testimony which would tend to establish any negligence so far as any defect in the brakes was concerned. But we say that there were no brakes nor any of the appliances pertaining to the brakes on this engine.

It is important to remember in this connection that we are not now dealing with the case of an inexperienced youth.

The defendant in error has displayed a good deal of learning along several different lines. He testified (Tr., p. 24) that he had had quite a lot of experience as fireman on the St. Louis, Iron Mountain and Southern Railroad; that he had also been employed on the Houston and Texas Central over two years. He testified on cross-examination (Tr., p. 33) that he had worked in the locomotive, mechanical, truck, and tank departments, and had been a brakeman and a fireman, and that he was thoroughly familiar with the methods and manner of truck and tank building, and in some portions of his testimony he displayed unusual knowledge of the construction of the engine and the parts connecting the engine and the tank, how they worked, how much play they have, the distances apart, etc. He also tried to discourse on the principles of law relating to master and servant as evidenced in his cross-examination at the bottom of page 34 and top of page 35. Then, along in the middle of the page, he speaks of it being more dangerous to back up than to go ahead, but not so much so as to be *obvious*. Assuming to have some knowledge of the principles of law as applicable to master and servant, it is shown by his evidence that he had willfully and purposely disregarded the duties resting upon him in that regard, for he testified on page 37 of the transcript: "I have got no business knowing any machinery at all, because I am not an engine inspector," and reiterated this same statement in other places. Not only did he disregard the duties imposed upon him by law which entered into his contract when he was employed by this railroad company, but he also willfully violated rule 200 of the defendant company which required every person accepting

positions to see that the machinery or tools which he is to use are in safe condition to perform the services required, and to report those defects as per rule 203.

Possessing all of this knowledge and knowing well the rules of the company as he claimed to know them, and having represented himself as an experienced and competent fireman, he is certainly cut off from any claim of ignorance in any respect. The law books have a good deal to say about the duties of the master to inform inexperienced employees about hidden defects and dangers, and the hazards of using certain kinds and character of machinery, but no decision or no text-book can be found which requires the master to call the attention of experienced men to as plain a fact as it was that this engine had no brakes on the driving wheels. The very object of calling the attention of employees to certain things is based upon the idea that by reason of their youth or inexperience they would probably not observe them or would not be acquainted with the dangers connected with the operation of certain kinds of machinery. In this case, nothing of that kind exists, and how could anything be more absurd than to take up to an engine an experienced man who is thoroughly familiar with all of the parts and is in fact a builder of parts of an engine, and say to him that this engine has no brakes? It is shown that these brakes occupy a most conspicuous place, and it might as well be said that it would be the duty of the master to call the engineer's attention to the fact that a certain engine that he was expected to operate did not have any wheels. This is the height of absurdity.

The case of Fordyce vs. Edwards, 60 Ark., 41, and 65 Ark., 98, is conclusive upon this proposition.

Whether there were shoes or no shoes on the brakes or whether there were no brakes at all on the driving wheels, no negligence is shown.

There is no charge in the complaint that it was negligence to operate an engine without shoes to the brakes of the driving wheels, or to operate an engine without any brakes at all on the driving wheels of the engine. It is not shown that this is contrary to the usual practice of other railroads or violates any custom or usage of this road. The only evidence which plaintiff offers which might be construed into a stagger in that direction is found on page 53 of the transcript, where Holloway testified as follows:

"Q. Did you ever work on an engine before in your life that was not properly equipped with brakes?

A. No, sir, I have had once in my life to cut out the tank brakes, because it wouldn't work; that is done by the valve under the cylinder."

This proves nothing, because it does not undertake to show when an engine is properly equipped with brakes; it does not show what the general custom or usage with reference to equipping engines with brakes is or whether it is considered dangerous to operate an engine like this without brakes on the driving wheels. It is shown that this was a light engine and the question of what would be a proper equipment of an engine with brakes must be determined by many circumstances. It might be necessary to equip certain engines with certain kinds of brakes and other engines with certain other kinds of brakes. Railroads have the right to equip their engines in the way that the work that they are intended for can be best performed.

Bailey, in his work on Master's Liability for Injuries to Servants, page 7, says:

"It was said by a Pennsylvania court that 'the test of negligence in methods, machinery and appliances is the ordinary usages of business.'"

Again, on page 24, he says:

"The general rule requires of the master that he provide materials and implements for the use of his servant, such as are ordinarily used by persons in the same business.

"In Washington & G. R. Co. *v.* McDade, 135 U. S., 574, it was stated that the master was justified in using such machinery as the experience of trade and manufacture sanctioned and in The Maharajah, 40 Fed., 784, it was said: 'If, in any case, the master could be held liable for accidents happening to workmen whom he had hired to work upon a well-known machine in its usual condition, it could only be when it might fairly be said that, having reference to other machines, the machine in question was so hazardous as not to be fit for use.' Further the court say: 'As respects travel on steam railways, many of the courts of this country hold the carrier bound to keep pace with new inventions in the directions of safety. But this rule is an exceptional one, established upon grounds of public policy and for the safety of human life. It has never been applied to the relation of master and servant. It is not negligence, or a breach of legal duty, for a master to hire men to work upon an old machine, merely because there are newer and safer ones in use, even though the newer ones many have some additional safeguards.'

"In Jacobson *v.* Cornelius, 52 Hun., 377, N. Y. Supp., 306, it was held that the mere fact that machinery could be put in and out of gear in a better manner, and so have made the operation more safe, by the use of certain appliances, did not tend to show actionable negligence."

The case of The Maharajah, 40 Fed. Rep., 748, referred to above, was a libel for personal injuries, and the facts in that case are analagous to this case, and the libel was there dismissed, and is a strong case in support of our position here.

The case of Cassidy *v.* R. R. Co., 164 Mass., 168, is a case where an employee was injured while he was at work in a freight car, by the falling upon him of a grain door, which had been swung up against the roof of the car, and there fastened by the plaintiff and a fellow servant a short time before. The court held in that case that the defect was an obvious one, of which the plaintiff had full knowledge, and in addition to that they say: "Nor is there any evidence that the hook used in this case was not a proper and usual hook to use, although another kind of hook was put in evidence."

In the case of Rooney *v.* Cordage Co., 161 Mass., 159, the court says:

"When the plaintiff entered the defendant's service, he impliedly agreed to assume all the obvious risks of the business, including the risk of injury *from the kind of machinery then openly used.* It is not material whether he examined the machinery before making his contract or not. He could look at it if he chose, or he could say, '*I do not care to examine it;* I will agree to work in this mill, and I am willing to take my risk in regard to that.' In either case, he would be held to contract in reference to the arrangement and kind of machinery then regularly in use by his employer, so far as these things were open and obvious, so that they could readily be ascertained by such examination and inquiry as one would be expected to make if he wished to know the nature and perils of the service in which he was about to engage."

In the case of Toomey *v.* Donovan, 158 Mass., 237, the court says:

"The fact that there was no guard was an obvious one; and, in working on the machine, he must be held to have assumed the risk resulting from the absence of a guard. Whether he did or did not know that automatic guards were in use in such machines was immaterial. He agreed to work

on the machine as it was, and the defendants owed him no duty to put on the guard. Having assumed the risk of operating the machine without a guard, the plaintiff cannot now claim that one should have been put on."

In the case of Moulton *v.* Gage *et al.*, 138 Mass., 393, the court said:

"The plaintiff was employed to work upon the platform as it was constructed. There was no hidden defect in it; it was what it appeared to be. The absence of the railing and the risks consequent thereon were obvious, and as well known to the plaintiff as to the defendants; and, upon familiar principles, the plaintiff cannot recover for injuries sustained in consequence of it."

In Jones *v.* Malvern Lumber Co., 58 Ark., 125, the court held:

"An employee is required to notice patent defects in machinery about which he is employed, and is bound to assume the risk thereof, to the same extent as if their existence had been within his actual knowledge."

In Brooks *v.* R. R. Co., 47 Fed., 688, it was said:

"The plaintiff, in accepting employment from the defendant as a switchman in the yard in which this engine was used, must be held to have assumed the risk of all injuries to himself ordinarily incident to that situation, including such as were liable to occur in consequence of any *visible* defect in the machinery and appliances supplied for use in connection with his work. The alleged defect in this engine was visible, and should have been, if it was not in fact, known to the plaintiff before he suffered the injury described in this complaint. He cannot be heard to say that he did not know of the existence of the defect, or that he could not discover it, for he must be regarded as having guaranteed to the defendant his own competency for the situation in which he was employed, which necessarily required the possession on his part of sufficient knowledge of locomotive engines, draw-heads, and coupling apparatus to be able to recognize, upon seeing it, a dangerous defect of the character described."

In the case of Texas & Pacific Ry. Co. *v.* Rogers, 57 Fed., 381, the court said:

"A servant is bound to see patent and obvious defects in appliances furnished him, and assumes all patent and obvious risks, as well as those incident to the business; and where he knows or ought to know of the defect in the appliances, and continues to work with the same, and receives injuries therefrom, he is treated as being guilty of contributory negligence, and cannot recover. The servant in order to recover for defects in the appliances in the business, is called upon to establish three propositions: (1) That the appliance was defective; (2) that the master had notice thereof or knowledge, or ought to have had; (3) that the servant did not know of the defect, and had no equal means of knowing with the master."

In the case of Patton *v.* Texas & Pacific Ry. Co., 21 Sup. Ct. Rep., 275 (20 Am. & Eng. R. R. Cas. (N. S.), 53), the court said:

"Neither individuals nor corporations are bound, as employers, to insure the absolute safety of machinery or mechanical appliances, which they provide for the use of their employees. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed."

The question of whether or not there were brakes on the engine was not left open to be determined by the jury, because the court found, as a matter of fact, from the evidence, that there were no brakes upon the engine and instructed the jury that the only question for them to determine in that respect was whether the plaintiff knew, or ought to have known, the fact that there were no brakes on the engine.

In the case of Tuttle *v.* Railway, 122 U. S., 194, the court says:

"For analogous cases as to the right of a manufacturer to choose the kind of machinery he will use in his business, see Richards *v.* Rough, 53 Mich., 212; Hayden *v.* Smithville Man. Co., 29 Conn., 548."

These cases having been approved by the Supreme Court of the United States, we respectfully call the attention of this court to them as conclusive upon the proposition that the railroad company had a right to operate this engine without brakes upon the driving wheels, and that no negligence can be imputed to the railroad company for so doing.

The case of Denver Tramway Co. *v.* Nesbit, 45 Pacific Rep., 405, is so clearly in point and covers so many phases of this case that we quote the opinion in full as follows:

Goddard, J. (after stating the facts): "From the undisputed facts in this case, it appears that the appellee was engaged as conductor in operating a train of cars on appellant's street railway, and, while the train was in rapid motion, attempted to step from the rear of the motor to the trail car, and, by reason of the sudden bobbing up of the motor at the time, missed the hand rail on the trailer, and fell in such a way as to bring his foot and ankle under the rear wheel of the trailer. There was no fender or life guard on the trailer, and the company at the time was using trial cars both with and without the guard. Its absence or presence was open to observation, and easily discernible by the most casual inspection. Upon these conceded facts, we think it was the duty of the trial court to have withdrawn the case from the consideration of the jury, and have determined, as a matter of law, that they were insufficient to show liability on the part of the company.

"Aside from the question whether the conduct of the appellee in attempting to pass from the motor to the trail car while the train was running at a rapid rate of speed, and his fall under the circumstances, was not the proximate cause of the injury, there are apparent other and controlling reasons which exempt the company from liability. Its failure to place a guard upon the trail car cannot be said to constitute negligence *per se*, and, whatever weight may be given to such failure as a factor conducing to the injury of a stranger, it certainly constituted no breach of duty on the part of the company towards its employees to operate its cars without such guard. In other words, an employer is under no implied obligation, by the contract of employment, to furnish any particular kind of machinery, or to adopt the latest improvements and appliances. He is only bound to see that

that which he does employ is reasonably safe and suitable for the purpose for which it is designed. Wood, Mast. & Serv., 690; Railway Co. *v.* Smith, 18 Ill. App., 119; Railway Co. *v.* McCormick, 74 Ind., 440; Railway Co. *v.* Gildersleeve, 33 Mich., 133. While the want of a life guard may have enhanced the risk incident to appellee's employment, it did not constitute such a defect in the construction of the car as to render it unsafe or unsuitable for the business in which it was employed. As was said in Sweeney *v.* Envelope Co., 101 N. Y., 520, 5 N. E., 358: 'In the absence of defective construction or of negligence or want of care in the reparation of machinery furnished by him, the master incurs no liability from injuries arising in its use. The general rule is that the servant accepts the service subject to the risks incidental to it; and where the machinery and implements of the employer's business are at the time of a certain kind, and the servant knows it, he can make no claim upon the master to furnish other or different safeguards.' But even conceding that the want of a life guard rendered the car defective, and the company was guilty of a breach of its duty in failing to supply it, and in operating the train without it, such defect was certainly obvious, and one that the appellee could not have failed to observe if he had used his eyesight, and one that was as open and patent to him as to the company; and, if danger was to be apprehended from the use of a car in that condition, that result was equally apparent to him. Under these circumstances, he was precluded from recovering, by the well-settled rule that an employee assumes all the risks naturally and reasonably incident to the service in which he engages, and those arising from defects or imperfections in the thing about which he is employed that are open and obvious, or that would have been known to him had he exercised ordinary diligence. By voluntarily continuing in the service with knowledge, or means of knowledge, equal to his employer's, of any defect in the appliances or the machinery used, and without objection, or promise on the part of the employer to remedy the defect, the employee assumes all the consequences that result from such defect, and waives the right to recover for injuries caused thereby. Rogers *v.* Railway Co., 76 Tex., 502, 13 S. W., 540; Railway Co. *v.* Bradford, 66 Tex., 732, 2 S. W., 595; Power Co. *v.* Murphy, 115 Ind., 566, 18 N. E., 30; Sullivan *v.* Manufacturing Co., 113 Mass., 396; Quick *v.* Iron Co., 47 Minn., 361, 50 N. W., 244; Brewer *v.* Railway Co., 56 Mich., 620, 23 N. W., 440; Moulton *v.* Gage, 138 Mass., 390; Railway

Co. *v.* Flanigan, 77 Ill., 365; Ladd *v.* Railway Co., 119 Mass., 412; Whart. Neg., sec. 214, and cases cited; Wells *v.* Coe, 9 Colo., 159, 11 Pac., 50. Applying this rule to the facts of this case, it is clear that appellee was not entitled to recover, and the court below erred in refusing a verdict for defendant. The judgment is reversed, and cause remanded." Reversed.

We say that if the complaint can in any way be construed so as to charge negligence in operating this engine without brakes, that there is absolutely not a particle of proof to establish any such allegations.

In Patton *v.* R. R. Co., 21 Sup. Ct. Rep., 275, the court says:

"The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. R. R. Co. *v.* Barrett, 166 U. S., 617. It is not sufficient for the employee to show that the employer may have been guilty of negligence; *the evidence must point to the fact that he was.*

In Railroad Co. *v.* Becker, 67 Ark., p. 7, the court approved the following instruction:

"The presumption is that the railroad company has done its duty by furnishing safe and suitable appliances for the performance of its work and when this is overcome by positive proof that the appliances are defective, the plaintiff is met by the further presumption that the railroad company had no notice of the defect and was not negligently ignorant of it. It is not sufficient to show that the plaintiff was injured, and that the injury resulted from an alleged defect, but he must go further and establish the fact that the injury happened because the railroad company did not exercise proper care in the premises."

There is no evidence in this record which would even tend to overcome or discharge any of the burdens resting upon the plaintiff in any of the foregoing respects.

In addition to the fact that there was no charge or proof of negligence upon which a verdict could be based,

there is still another and equally as obvious a reason why this case should not have been submitted to the jury, and that was that

The alleged defect as to the brakes was not the proximate cause of the injury.

There is no principle of law better settled than this, that notwithstanding the master may be negligent in the way of furnishing a safe place to work and safe appliances to use, yet this will not constitute actionable negligence unless the negligence was the proximate cause of the injury.

Undoubtedly the proximate cause of this injury was the presence of the horse on the track, without which the collision and accident could never have happened.

This court, in the case of R. R. *v.* Moseley, 57 Fed., 926, said:

"That negligence is the proximate cause of the injury from which the injury might or ought to have been foreseen or reasonably anticipated under the circumstances as its probable result; that negligence which sets in motion a train of events that in their natural sequence might or ought to be expected to produce an injury *if undisturbed by any independent intervening cause* is the proximate cause of the injury."

In the case of R. R. *v.* Elliott, 55 Fed., 951, this court said:

"But an injury that could not have been foreseen or reasonably anticipated as the probable result of the negligence is not actionable, nor is an injury that is not the natural consequence of the negligence complained of, and would not have resulted from it, *but for the interposition of some new, independent cause that could not have been anticipated.* Obviously, the relations of causes to their effects differ so widely, and are so various, that no fixed line can be drawn

that will in each case divide the proximate from the remote cause. The best that can be done is to carefully apply the rule of law to the circumstances of each case as it arises. The effect sometimes follows immediately upon its moving and proximate cause, and, again, that cause works out its effect with unerring accuracy after a long period of time. A brakeman carelessly jostles a passenger from a moving train, and the effect follows at once. A tenant carelessly sows thistles in his landlord's field, and the effect follows months later, but not less surely. Again, an effect is sometimes the result of many fortuitous circumstances, no one of which can be fairly said to have been its proximate or moving cause; in other words, it is an accident,— a result that no one knowing the circumstances before the catastrophe could have reasonably anticipated. If an injury is the result of such an accident, or if the plaintiff fails to show that the negligence with which he charges the defendant was the proximate cause of the injury, there can be no recovery in his favor."

Now, in this case, if it can be said that it was negligence to operate an engine without brakes upon the driving wheels, it could not in itself have produced this injury. The engine had run about fifteen miles without any accident, and if it had not struck some obstruction on the track it would have gone to its destination without any accident. We can readily observe the distinction as laid down above by supposing that instead of an absence of brakes, there had been a broken axle or a broken wheel, and there had been sufficient evidence introduced to show that the company was negligent in respect thereto. Now, the natural and probable result of operating an engine with a broken axle or a broken wheel might result in a derailment of the engine. We must take into consideration another fact in the discussion of this question, and that is, how it was that this engine was to be backed up. Turning to the order of the dispatcher, we find that he directed it to be done carefully. He must have been of the opinion that if

this engine was backed up carefully it could be done without any very great danger to the fireman and engineer. This is true also of the fireman and the engineer, because Holloway says (Tr., p. 34):

"Q. You made a 'holler' on it and objected to it, and sent word to the dispatcher to let you turn?

A. Yes, sir; but after taking the matter under consideration, Mr. Davis and I had a talk in regard to turning the engine, and it being a case of emergency, I considered if they wanted me to back the engine up, they would use all the precautions on earth to give me a clear track and clear of all obstructions, and thinking, too, I could make the trip without any great danger to myself, I agreed to go, they being the master and me the servant. After I took the matter under consideration, I came to the conclusion I could take the run with perfect safety."

Now, of course, all of that part of his statement that he thought they would use all precautions on earth to give him a clear track and clear of all obstructions, is the merest nonsense, because he knew perfectly well that the railroad company was not sending a track-walker or a hand-car ahead of the engine to see that nothing was on the track. So that he left Brinkley under an order which he says he read, which order directed them to back up carefully, and he says after taking the matter under consideration, he thought it could be done with perfect safety. The accident did not occur by reason of the alleged defect in the brake, but it occurred by reason of the fact that a new and independent cause sprung up, and intervened, which was in nowise connected with the alleged defect in the engine, and a cause for which the company was not responsible, and for which no negligence can be imputed to them, because the court told the jury that the

presence of the animal upon the track could not be imputed to the railroad company as negligence.

Our position here cannot be any more clearly or appropriately expressed than it was by Judge Sanborn in the case of Motey *v.* Pickle Marble & Granite Co., 74 Fed., 158, where he said:

"Counsel for the plaintiff write in their brief:

"'The danger of the marble falling was evidently not so apparent as to attract the attention of an ordinarily prudent man, for the superintendent himself was in the same position, and was caught and injured at the same time as Motey.'

"If this be true, then the defendant was guilty of no actionable negligence here, and the plaintiff cannot recover; for an injury that could not have been foreseen or reasonably anticipated by any ordinarily prudent man as the natural result of the negligence is not actionable. Railway Co. *v.* Elliott, *supra*. If, on the other hand, this statement of counsel is incorrect, and if this injury could have been foreseen or reasonably anticipated by an ordinarily prudent man, then the plaintiff could have foreseen and anticipated it. He must be presumed to have been an ordinarily prudent man, for there is no evidence that he was not. He had every opportunity to foresee and anticipate the result. The danger and risk were neither secret nor occult. They were plain and open. They were but some of the ordinary risks and dangers of the employment in which he was engaged. They were dangers and risks which, under the well established rules of law, he had himself assumed. If the superintendent was negligent, then the plaintiff was; and if the negligence of either or both caused the injury, then the negligence of each contributed to it. A verdict for the plaintiff could not have been sustained upon this state of facts, and the court properly instructed the jury to return a verdict for the defendant."

Holloway throws some light on the question of what was the proximate cause of the injury, in his answer to interrogatory No. 19 (Tr., p. 42), when he says that the horse being on the trestle was the cause of the accident.

The case of Dickson v. Omaha & St. Louis R. R., 25 L. R. A., 320, is a case squarely in point. That was a case where a railroad company was charged with negligence by reason of the failure to fence its track and thereby permitting stock to enter the right of way and graze upon the track. The railroad company in that case tried to defend upon the theory that although they might have been negligent in that respect yet they said the fact that the engineer in that case was running at a higher rate of speed, contrary to the rules of the company, and did not have his train under control at the time, was the proximate cause of the injury.

The court came deliberately to the conclusion that while the engineer may have been negligent, yet the failure to maintain a fence was the proximate cause of the injury, and sustained a verdict against the railroad company. Now, the fact as to whether it was negligence to permit stock to stroll upon the track cannot alter the fact of what was the proximate cause of the injury. If the presence of the animal upon the track in that case was the proximate cause of the injury, it would still have been the proximate cause, regardless of whether the court had found that it was negligence for the animal to be upon the track or not. Now, in this case, the court declared that the presence of the animal on the track was not negligence, yet that cannot alter the fact that the presence of the animal was the proximate cause of the injury.

The court, in concluding its argument, say:

"We can speculate and theorize as we may as to what course of conduct might have avoided the disaster, but the fact remains that the direct cause was the obstruction of the

track, which was brought about by the negligence of defendant, and the consequences of which could not have been avoided by any degree of care deceased could have exercised. What might have been the result, had the rule been observed, is mere speculation."

If we are wrong in saying as a matter of law that the presence of the horse upon the track was the proximate cause of the injury, then there can be no question but that the instructions of the court along that line are very misleading if not wholly incorrect.

The court told the jury that the first, second, third, fourth, and fifth specifications of negligence set out in the complaint did not amount to negligence on the part of the defendant.

Then he instructed them as follows:

"If you find that the fact of the engine being without brakes was unknown to the plaintiff and could not have been known to him by the exercise of reasonable diligence under the circumstances of the case, as shown by the evidence, and that if the engine had proper brakes the accident would not have happened, then your verdict should be for the plaintiff, but if you find either of these facts the other way your verdict should be for the defendant."

He then proceeded to direct the minds of the jury to what he meant by this, which was that if the engine could have been stopped after the animal was discovered had it been equipped with brakes, then plaintiff could recover, etc.

Now, while this instruction is good perhaps so far as it is applicable to the facts as to whether this engine could have been stopped after the animal was discovered on the track if it had been supplied with brakes upon the driving wheels, yet it is objectionable for the reason that it limited the scope of the inquiry and concentrated the minds of the jury upon

this one ground of alleged negligence in considering the question of what was the proximate cause of the injury. We think the court was correct in telling the jury that they could not consider the first, second, third, fourth, and fifth charges of negligence, as stated in the complaint, as grounds of negligence, but the jury, if they had been free to do so, might have found that one of these very things which the court told the jury was not negligence on the part of the railroad company was the proximate cause of the injury; for instance, the jury might have found that the absence of a light on the head of the tender was the proximate cause of the injury; they might have found that the fact of not placing a man on the footboard in front of the engine with a white and red light was the proximate cause of the injury, or they might have found that the fact of not providing and furnishing the engine with a pilot or cowcatcher was the proximate cause of the injury, or they might have found that the fact that this was a square or box engine and did not slope downward and forward so as to give a better view in front of the engine, was the proximate cause of the injury. It would have naturally followed then that if the jury had determined that something was the proximate cause of the injury which was not negligence on the part of the railroad company, that the plaintiff could not have recovered.

We think the peremptory instruction should have been given for the following reason also:

The court instructed the jury as follows:

"Now, the next fact to be determined by you, if you find this issue of knowledge of the condition of the engine against the defendant, is whether the accident from which

plaintiff received his alleged injuries was caused by reason of want of brakes on the engine. For if the accident could not have been prevented even if there had been suitable brakes on the engine, then the plaintiff cannot recover anything in this action, and your verdict should be for the defendant. On this issue the evidence is conflicting. Only two persons were present at the time the accident happened, the plaintiff and Davis, the engineer.

"The plaintiff testified that while he did not see the horse that caused the accident, the engineer called to him, 'Lookout! lookout!' that this exclamation of the engineer was made long enough before the horse was struck to have stopped the engine had it been supplied with proper brakes, but having no brakes on the engine the failure to stop the engine as rapidly as could have been done if supplied with brakes, caused the accident whereby plaintiff was injured. On the other hand, the engineer testifies that he did not see the horse until after the engine had struck it and had been derailed. It is for you to determine which of the testimony is to be believed. To do so, you are to take into consideration all the circumstances existing at the time; the kind of night it was; the fact that the locomotive was running backward; that there was no light in front; that the engineer kept as good a lookout as was possible; also the interest of each witness in the result of this suit, and all other facts which as sensible men you would consider in a matter of importance concerning yourselves, including the fact whether if there had been brakes the engine could have been stopped before striking the horse after its presence in the track had been discovered by the engineer.

"If you find that the fact of the engine being without brakes was unknown to the plaintiff and could not have been known to him by the exercise of reasonable diligence under the circumstances of the case, as shown by the evidence, and that if the engine had proper brakes the accident would not have happened, then your verdict should be for the plaintiff, but if you find either of these facts the other way your verdict should be for the defendant."

We do not think, from the evidence in this case, that any reasonable mind could come to the conclusion that this accident could have been avoided, even if the engine had been supplied with brakes. The court undertakes to submit

the question upon what it supposes to be a conflict of the testimony. We think the court erred in instructing the jury that there was a conflict upon this point, because we do not believe that any reasonable man can read this evidence and say that there is any real substantial conflict. (See in this connection the twenty-third assignment of error.)

HOLLOWAY testified (Tr., p. 27):

"I was putting my fire in and Davis was looking out, and the first thing you know he yelled out to me to lookout, and I had my face right out of the firebox and of course I was blinded; the fire was perfectly white in the firebox, and I shut my door and hit to get out, and my intention was to step out backward and put my foot on the step and catch myself the way the engine was going, to keep from falling, and as I stepped back, he applied the air, threw the air into the emergency, gave her all the power she had to stop her, and in an instant it struck the horse. Well, this tank and engine all bungled up together and caught me as I went to get out. I hallooed to him to release his air, I was caught, and he released his air and that caused the tank to separate, and I fell and dropped right on my knees in the tank, and as quick as I hit the tank floor, I left it flying, just as fast as I could get out of it. I went off in the brush."

Transcript, page 28, he testified:

"Q. About how far, according to your judgment, did the car run before it struck the horse, after Davis hallooed, 'Lookout! lookout!'?

A. Why, anywhere from fifty to seventy-five feet. I couldn't say exactly; *that is only a matter of guessing; but I suppose somewhere between fifty and seventy-five feet.*

Q. You say you were engaged at work, putting in a fire, when he hallooed, 'Lookout,' you closed the door as quick as you could, and when you straightened up, at that time, had the car struck the horse then?

A. No, sir; it hadn't struck the horse. As I turned my back it hit the horse.

Q. You turned back and was attempting to get out?

A. Yes, sir.

Q. You think then that it must have been anywhere from fifty to seventy-five feet from the time he hallooed, 'Lookout! lookout!'?

A. Yes, sir; it must have been from fifty to seventy-five feet."

It will be seen that this is merely a guess or an approximation by Holloway as to how far the engine ran after it struck the horse, as he does not state anywhere in the record that Davis either said at that time or at any time afterwards that at the time he hallooed, "lookout," he saw a horse upon the track or any other animal. It might have been that if Davis did halloo at that time, that Davis had some other reason for calling to him to lookout, because as we shall see later, Davis testified that he did not see the horse until he struck it.

But let us, for the sake of argument, assume that Davis did see the horse at the time he hallooed "lookout," we do not think that this is sufficient evidence of the fact that it was fifty or seventy-five feet from where he discovered the horse, because Holloway testified that at the time he was stooping down putting in his fire, and that he was blinded.

On cross-examination, it was sought to test Holloway's accuracy of distance.

He testified (Tr., p. 36) that after he got down out of the engine he walked back to flag the train which was following:

"Q. How long is that bridge?

A. I couldn't tell you; I didn't measure.

Q. About how long?

A. I walked across it, but I don't have any recollection.

Q. You can form some sort of an idea about how long that bridge is?

A. No, I cannot, because I don't remember anything about it.

Q. But you are undertaking to detail other things that took place. I must insist that you give some idea of about how long that bridge is?

A. I have no idea at all.

Q. You say you have no idea about how long that bridge was?

A. No, sir; I didn't pay any attention to the bridge at all; I was hurt.

Q. You were about the center of the bridge when you struck that horse?

A. Judging from about where the scars, the brake or something had been pulled over, but I never paid any attention to the distance."

Holloway tries to excuse himself for not observing the length of this bridge by saying that he was hurt, but yet in another place he states that after he was hurt he examined the engine to find out what was the matter with the whole outfit, and furthermore, he testifies that he was obliged by the rules of the company to go back and flag this train, so that this shows conclusively he was not so completely disabled as to destroy his power of observation or to keep him from the performance of his duty.

Now, how ridiculous it is for a man in a moving engine down over a fire to undertake to estimate distances, when he cannot even give a rough guess at the length of the bridge that he immediately afterwards walked over with his torch in his hand, and that, too, when he was engaged in an investigation as to what caused the accident.

We think this little incident very significant because he had ample opportunity to observe the length of the bridge, and shows that he was absolutely unwilling to furnish any test by which the accuracy of his estimated distance could be

determined. It is all right for a man to estimate fifty feet if he can follow it up with some good reasons to show why he thought it was fifty feet. If a man should say that he went from St. Louis to Chicago, we might have no reason to challenge his statement, but if, on cross-examination, he were asked whether he went by the way of the Wabash or the Illinois Central or the Big Four, or whether he walked, or rode in a buggy, and would be unable to tell, we think that would be quite a sufficient reason to say that he was not telling the truth at all about having gone to Chicago.

But even if it were fifty or seventy-five feet, it would not be of any advantage to Holloway in this case, because he introduced Will Barger, who testified on page 82 as follows:

"Q. Suppose that (the engine) was going at the rate of about seven miles, not to exceed seven or eight miles an hour, with no cars behind it, nothing but the engine and the tank, how far would that run on level ground, going seven or eight miles an hour, and where there was just the engine and the tank, and where both the engine and the tank were properly equipped with brakes, how far would that run before it would stop, after turning on the air brakes?

A. Why, about ninety feet, something like that; two rail lengths.

Q. If there were no brakes on the engine, take this engine, the same condition I have already stated, if there were no brakes on the engine, about how far would it go then before it could be stopped, with brakes on the tank and none on the engine?

A. Why, it would go further, of course; it would go about 100 or probably 125 feet."

The plaintiff introduced Mr. Farrell, who testified (Tr., p. 83):

"Q. Take an engine like that, and the same tank, on a level road, where both the engine and the tank are properly equipped with air brakes, how far would they run after the

air brake was applied to the engine and to the tank, ordinarily, on a level road?

A. Well, it is owing to how fast the engine was running at the time.

Q. Say running at a speed of seven or eight miles an hour?

A. Well, it ought to stop within sixty or seventy-five feet.

Q. Suppose there are no brakes on the engine, but brakes on the tank, how far would it go?

A. I think it would run forty or fifty feet farther, something like that."

So that if you take the evidence of his own witnesses, it would have been impossible to have prevented the striking of this animal after he claims Davis discovered it on the track.

Now, Engineer Davis, whose deposition was taken by the plaintiff, on redirect examination, testified as follows (Tr., p. 75):

"Q. At what rate of speed was you going when you ran over the horse?

A. About seven miles an hour.

Q. Were you keeping a lookout when you ran over the horse?

A. Yes.

Q. If you were keeping a lookout, how far ahead was the horse when it was first discovered?

A. *I did not see the horse until we had ran over it, and had stopped.*

Q. *Did you apply your brakes at all?*

A. *I did not until after I had ran over the horse.*"

To substantiate Davis in this respect, the defendant below introduced witnesses to show that even if it was true as testified by Holloway that the horse was discovered fifty or seventy-five feet before it was struck and the air was applied promptly, as Holloway states that it was, that even without

brakes on the engine, it could have been stopped before the collision occurred.

E. M. ROBERTS testified (Tr., p. 66) as follows:

"Q. Now, Mr. Roberts, I will ask you, if that engine was traveling say six or seven miles an hour, under perfect control, and an animal should be discovered on the track, say fifty or seventy-five feet in front of the engine, whether it could be stopped or not?

A. Yes, sir; the air should be plenty strong to stop it in less than that many feet. It ought to stop it in thirty-five feet or thirty feet — forty feet at the outside."

He reiterated this statement in his cross-examination, page 67.

C. H. WELCH testified (Tr., p. 70) as follows:

"Q. Now, Mr. Welch, suppose that engine, equipped as it was, with brakes on the tender, and under perfect control, running five or six or seven miles an hour, and an object was seen, could it be stopped in time to prevent running over the object?

A. Well, an engine that is not moving more than six or seven miles an hour, with a good tank brake, ought to stop in forty-five to fifty feet, if they are not making more speed than that."

He reiterated this statement in his cross-examination on transcript, page 71.

It will thus be seen that even taking Holloway's theory that it was fifty or seventy-five feet, the engineer could have easily stopped the engine. We do not think from this evidence that any reasonable jury could find that the engineer saw this horse before it was struck, and even if he did that he could not have stopped the engine before striking it. The engineer is fully corroborated by all the circumstances in this case, as we have observed before, because it was a dark, misty night. The engine had no headlight. The engine

was a square one, so that a view could not be obtained from where the engineer was sitting, and Holloway charges all of these things as negligence in his complaint, and obviously for the reason that he was then trying to show that the company had made it impossible to see any obstructions on the track, and when the court rules them out, why, then, in order to make a case, he tried to make it appear that notwithstanding these things, the engineer was able to see the horse on the track some fifty or seventy-five feet. The engineer is further corroborated by the fact that the horse was dark colored.

Now, we say that it is a physical impossibility, and the jury were no more justified under these circumstances in believing that the engineer saw this horse before they struck it, than they would have been justified in believing that white was black simply because Holloway testified to that fact. It was physically impossible and his statement is unreasonable. The evidence of Mr. House with the exhibits thereto attached as found on the transcript, page 88, was for the purpose of contradicting Davis, but he was contradicting his own witness, because he took his deposition, and furthermore shows that even if Davis had ever made any such statements as claimed, that they were made at a time when he was consulting with Mr. House about bringing a suit in his own behalf. The facts and circumstances corroborate Davis in his testimony and tend to establish the absolute accuracy of his statement, and more than overcome any weight that ought to be given to the contradiction as found in the evidence of Holloway or Mr. House.

There is still another reason why the peremptory instruction should have been given, and that is, that it appears from Holloway's testimony that it was a physical impossibility to be injured in the way he says he was.

We must remember now that this happened on a track running east and west from Little Rock to Memphis. The engine was headed west towards Little Rock and was backing up with the tender forward in the direction of Memphis. The engineer's side of an engine is on the right-hand side, which would throw him on the north side of the track, and the fireman's side is on the left-hand side, which would throw him on the south side of the track.

On transcript, page 47, Holloway testified:

"Q. Well, after you got down, you stated this morning that you examined the engine; just state how the engine stood?

A. The rails on either side were turned over and the engine was on the bottom of the rail.

Q. Were the wheels of the tender on the bottom of the rail?

A. No, sir; they were off.

Q. How much off?

A. I suppose something like twenty or thirty inches.

Q. It had sort of gone around to one side?

A. Yes, sir; it veered a little as it left the track.

Q. About how much had it veered?

A. About thirty inches, I suppose, somewhere between twenty and thirty inches.

Q. Which way did it veer?

A. To the south.

Q. Which side did you go out on?

A. I went out on the engineer's side.

Q. On which side of the engine does the engineer sit?

A. The right-hand side."

Now, it will be seen from this that the tank or tender when it struck the horse left the track on the south side and

veered to the south about twenty or thirty inches. The effect of this must necessarily have been to throw the ends of the engine and the tank or tender on the fireman's side closer together, but Holloway states that he went out on the engineer's side, and the ends of the engine and the tank or tender on the engineer's side must, of necessity, have been thrown farther apart and a wider opening made at the point where Holloway says he left the engine.

This was clearly a case of assumed risk.

If the facts in this case do not make this an assumed risk pure and simple, it would be hard to state a case where the rule could be applied. Holloway certainly had no right to rely upon any presumption as to the safety of this engine. It had been delivered to him with the distinct understanding that it was going to the shops for a general overhauling; that it was an "old scrap pile." The traveling engineer, having thus informed Holloway as to the condition of this engine, it seems to us that the presumption in this case as to safe machinery, etc., would be exactly reversed and that Holloway would have no right to presume that any part of the machinery was in safe condition unless that particular part had been pointed out to him at the time he accepted service on the engine and he was informed that it was safe. How much more notice could be given to the servant than was given in this case? Then, again, it is not shown that Holloway was placed in a sudden position of danger without time to reflect or opportunity to investigate. He states himself that he sat down upon the ties on the outside of the engine just under the gangway to make some temporary repairs. He

could have placed himself in no better position to observe whether there were any brakes on the engine or not, than when he occupied this position. He testifies that he was cautioned to watch the brasses on the pony trucks which are just ahead of the driving wheels, and in doing this he must necessarily have been brought in close contact with the driving wheels and thus the very finest opportunity that could have been given him was afforded for observing the condition of the brakes. Then, again, when they arrived at Brinkley and were informed that it would probably be necessary for this engine to return, he states that he left the dispatcher's office just after he and Davis returned from supper and went to his engine "to get ready to go out, he had his lights to fix, his ash pan to clean, and to get everything ready." He knew then that it was a "scrap pile;" he knew it was likely they were going to back up that night. He was thus afforded the very best and fullest opportunities to observe and the very strongest reasons existed why he should observe. Then, when he takes the stand and tells us absolutely that he did not observe and that it was not his business to observe, and yet tells us that these defects of which he complains were perfectly patent and obvious, then it seems to us that the question of whether this was an assumed risk on his part is not even debatable.

We have read case after case on the subject of assumed risks in connection with this case, and the doctrine is so well settled and the facts seems to bring Holloway so clearly within the doctrine, that we are not going to tax the patience of the court with authorities upon this question.

For any or all of the foregoing reasons we think the peremptory instruction should have been given.

II.

The question of contributory negligence.

The defendant asked several instructions on the question of contributory negligence, which were refused by the court. These instructions are embraced in the eleventh, twelfth, thirteenth, and fourteenth assignments of error.

These instructions we think embodied correct principles of law, as applicable to this cause, and should have been given by the court. The court excluded entirely any question of contributory negligence on the part of the plaintiff. He told them that if Holloway knew or by the exercise of reasonable care ought to have known, that there were no brakes on the engine, and knowing this fact, that, as a reasonably prudent man, he would not have undertaken to make this trip, then he could not recover. This instruction fell far short of the requirements of this case. There is a well defined and marked distinction between the doctrine of assumed risks and the doctrine of contributory negligence. The court evidently recognized this fact in his instructions and came to the conclusion that if this was not an assumed risk on the part of Holloway, then the company was liable. In the discussion of these instructions refused, it will be well for us to advert for a short time to the record to ascertain something of the facts as to how this engine came to be at Brinkley, and how it was that the engine was to be backed up immediately from Brinkley to Hulbert.

It appears that Holloway left Brinkley at 5 o'clock, October 30, the morning of the injury, on engine C., O. & G. No. 33, with Davis as engineer. Brinkley is a middle

division between Little Rock and Memphis (Tr., p. 25). The distance from Brinkley to Hulbert is about sixty miles and Hulbert is about nine miles east of Hopefield (Tr., p. 25). They arrievd at Hulbert about noon (Tr., p. 34). When they arrived there they found W. & B. Engine No. 3 and received it from the traveling engineer, Mr. Waters. He said that the traveling engineer told him that No. 3 was going to the shops for repairs, as she had worn out all her brasses in the pony trucks ahead, and he used car brasses there for a makeshift, and the hose on the left side from the tank to the injector was bursted, and he said he wrapped that with some old bagging, and her blower pipe, the valve was off of it entirely, and it filled the cab with steam and water. He had a plug in there and kept it wrapped with waste. He said that the blow pipe, commonly called the blower, comes out of the boiler on the engine, comes back under the side of the boiler and goes up in the smokestack (Tr., p. 32). He further stated (Tr., p. 27) that the top hinge of the door to the firebox was broken off and he couldn't swing it open with the chain; that he had to pick it up and set it over on a latch, and in fact, he said the engine was a regular "*old scrap pile.*" He further stated (Tr., p. 32) that Waters told them that he had put some car brasses in the pony trucks, which would do until they could get to the shops, and told them to watch her and keep her from running hot and cool her down, and repack her and probably she would get to running cool after she formed a seat in the brasses.

On page 46 of the transcript he testified that the traveling engineer said he was sending her into the shops for an overhauling. He testified that he wrapped the hose right

under the tank as it was leaking. That to do this, he sat down on the edge of the ties on the outside right under the gangway, which is under the front trucks of the tank (Tr., p. 46). On transcript, page 47, he said that Mr. Davis, the engineer, asked Waters what was the matter with her, and Waters said, "She has got to go in the shops and be overhauled all over." The traveling engineer was there superintending the exchange of engines, oil, waste, cans, and everything.

On page 34 of the transcript, he testified that they registered out of Hulbert at about 1 o'clock to go to Brinkley on this engine No. 3; that they arrived there about 7:20 p. m. This was the first time that he had ever been on this engine. The engine was running light, that is, nothing but the engine and tank (Tr., p. 25).

On page 26 of the transcript, he testified that when they got to Brinkley they were told that they had to return to Hulbert; that they got off and went and got their supper at the Arlington Hotel, and after they came back from supper he and the engineer walked up to the office to ascertain if the operator would allow them to turn the engine, but receiving no answer, he said that he left and told Davis that he was going and get the engine ready to go out. He had his lights to fix, ash pan to clean, and to get everything ready. That after awhile, Davis came out and showed him something that he had written across a blank telegraph form sheet, which stated that the dispatcher said he did not want the engine turned.

He testified (Tr., p. 36) that they had been on the road then twenty-two hours, and would have had the right to demand rest if they had wanted it.

He testified (Tr., p. 32) that something was said by dispatcher in charge at Brinkley about backing the engine onto the train and carrying it down. (It will be shown a little later that there was a through freight at Brinkley at this time ready to go east.) The dispatcher told them to go in on the house track and this through train would pull in on the passing track, and engine No. 3 could drop in behind and this train would pull engine No. 3 down to Hulbert. (This seems to have been the plan at this time as to the way this engine No. 3 would be taken back to Hulbert.)

We will now turn to the scene of the night dispatcher's office in Little Rock, who was directing the movement of this engine.

The operator, Wells, testified (Tr., p. 72) that the engine left Hulbert at 1:05 p. m.; that it had been started into Little Rock for repairs, and while on the way from Hulbert to Brinkley, another engine which was provided at Hulbert was found to be in a worse fix than this one, and this engine No. 3 was stopped at Brinkley and kept there until the other engine could be heard from, to see which could be repaired first, and it was finally decided to run this engine No. 3 back to Hulbert to take the place of the other one, as it was in better shape than the one at Hulbert. They had to do some work on this engine No. 3 before it could go back; had some brasses to put in and one thing and another. That it got there about 7 o'clock in the evening, and it was 9 or 10 before it was ready to go back. There was another train going east about the time this engine was ready to go, and that Davis and Holloway were complaining about wanting rest, and they had no other crew that he knew of to

take this engine No. 3 back in case Holloway and Davis called for rest, and he tried to get them out of there as soon as he could on that account. He testified that there was considerable correspondence between himself and the operator at Brinkley with regard to the engine going out of there, and how it should go, and the delay that was going on, and the operator at Brinkley said something about turning the engine, but that he did not know whether he wanted to ask for an order to have it turned or not, but did not think he did; that he instructed the operator at Brinkley to let them go whichever way they wanted to go. He said he told them if they wanted to back up, all right, and if they didn't, all right. That he didn't give them any positive instructions either way until they decided to go, backing up, and then he gave them their orders (Tr., p. 72).

On cross-examination (Tr., p. 73) he testified that he understood that they had decided to back up, and that the order which he gave them was based upon their decision to run this way.

On re-direct examination (Tr., p. 74) he testified that he understood that Holloway was kicking for rest, that he had a right to demand rest, and that if he demanded it, he would necessarily have had to give it to him (Tr., p. 76).

Witness Wells is corroborated by Witness Davis, the engineer, as to the request to turn the engine, as he testifies on page 75 of the transcript as follows:

"Q. Was there any request made by you or your fireman of the train dispatcher for permission to reverse the engine?

A. I don't remember of any such request being made by myself or by my fireman."

The situation then seems to have been about this: That this engine No. 3, arrived at Brinkley about 7 o'clock p. m.; the operator there had been instructed to stop them, as it was likely that it would be necessary for this engine to return to Hulbert instead of going in to Little Rock; Davis and Holloway were jouring, because they had been on the road for twenty-two hours and wanted rest, and were also objecting to backing this engine from Brinkley to Hulbert; Wells did not care very much about whether they went backward or forward, and would not have objected to the engine being turned. This through freight was there and they had about decided to hook this engine No. 3 on to this freight train, and pull the engine down to Hulbert. In the meantime, the operator at Little Rock was anxious to get this engine back to Hulbert, and as the engineer and fireman were threatening to demand rest unless they got out right away, and not knowing that they had about decided to hook on to the back end of this freight train, and having also understood that they had decided to back the engine up, issued an order for the engine to back up carefully from Brinkley to Hulbert. Doubtless, if he had known that the engineer and Holloway were willing to wait for this freight train and go out hooked on to the rear end of it, he would have readily consented to that. It does not appear, however, that he had any knowledge of this intended arrangement at all. The operator's indifference as to how the engine should go, was doubtless influenced by the fact that it was then but 10 o'clock at night and they had practically the whole night before them to run sixty miles, and that if they ran very carefully the trip could be made with the engine backing that way without very much

risk, and was doubtless influenced more by the fact, as explained by Mr. Roberts in his testimony on page 68 of the transcript, that the engine as it then stood was facing as it would have to be in order to work in the pit at Hulbert; that if they had turned the engine at Brinkley to run it forward to Hulbert, that it would then have been necessary to run from Hulbert over to Hopefield in order to turn it, and in that event it would have been necessary to back the engine up from Hopefield back to Hulbert, so that in any event, in order to get the engine back to Hulbert facing as it must be in order to work in the pit, it would have been necessary for it to back up either this side or the other side of Hulbert.

Roberts understood that the engineer and Holloway were impatient because they were being held there as he testifies (Tr., p. 66) that he had a conversation with Davis, at which Holloway was present, in which Davis told him that if he did not go out right away that he and Holloway were going to bed.

From the foregoing, then, it appears that the engineer and Holloway were more responsible for this engine backing up that night than anyone else. If it was a dangerous thing to back this engine up, no one was certainly more impressed with the fact than Holloway himself, because he testifies on page 34 of the transcript that he made a "holler" on running the engine backward. He states on page 35 of the transcript that he knew it was a more dangerous thing to back up than to go ahead. In his statement on page 45 of the transcript, he stated that he remarked that night that this was the first time that he had ever been ordered out to commit suicide.

Roberts testified (Tr., p. 66) that he had a conversation with Davis in the presence of Holloway, and that they considered it unsafe and dangerous to back up through the bottoms at night, as the track was full of stock lying down on the track.

Furthermore, no one was better acquainted with the condition and kind of the engine that they had to back up with. Holloway had been fully informed of the condition of that engine, and he, himself, it seems, had made some temporary repairs and was informed, as he expresses it, that it was a veritable "old scrap pile." He knew that there was no cowcatcher on the tender; he knew also there was no light there; he charges in his complaint as one ground of negligence that it was a square or box engine, and the tank or tender did not slope forward and downward so as to give a better view in front of the engine; also that it was in the nighttime when it was dark and misty. So that he was fully informed as to the danger of this move, recognized it himself, and objected to it at the time. He started out on this trip, then, at this time knowing the dangers which confronted them, and how in the world the court could ignore the question of contributory negligence in this case is a thing that we are utterly unable to understand.

The case of Railroad *v.* Jones, 95 U. S., 439, fits this case exactly, and is good authority that the court has committed error in this respect.

This case is particularly conclusive as to the instruction contained in the twelfth assignment of error, because it told the jury that if this was a dangerous method to ride so far as obstructions on the track and roadbed were concerned,

and the plaintiff knew, or had reasonable cause to know it, then the plaintiff would be guilty of contributory negligence and cannot recover, regardless of whether the engine was defective in not having brakes on its driving wheels, and regardless of whether or not plaintiff had knowledge of that fact.

Now, in the Jones case the situation was precisely similar to this. The court simply in effect held that it was a dangerous place to ride upon the pilot. They held that it was negligence on the part of the railroad company to leave the cars with which the engine collided standing upon the track, and that Jones was guilty of contributory negligence, notwithstanding the fact that he had no knowledge of the presence of the cars upon that track. Now how can the situation be changed in this case, simply because Holloway alleges that he had no knowledge of the absence of brakes on this engine.

Admitting, for the sake of argument, that in this case it was negligence not to have brakes on the engine, it would only place this case on an equal footing with the Jones case, in which it was held that the presence of the cars with which the engine collided on the track, was negligence on the part of the company.

The case of Kresanowski *v.* Northern Pac. R. Co., 18 Fed. Rep., 229, which has been so often cited with approval by this court, we think particularly applicable to the instruction contained in the fourteenth assignment, because it shows that the engine in that case was the only means of transportation provided by the master, and that it was necessary for some of the employees to ride on the pilot of the engine.

This is not a case where an employee is suddenly called upon to take a dangerous position without any time for reflection or previous knowledge of the dangers attending the work assigned to him, nor a case of sudden emergency. The plaintiff recognized the danger of backing up this engine as soon as it was suggested, and it is shown that it is not a case where he was likely to lose his position from any insubordination or refusal to obey orders, but on the other hand, it is shown conclusively that there were at least three other things that could have been done had the plaintiff so desired and insisted upon them, either one of which would have been safer than backing the engine up. First, the operator states that if he had been requested to permit them to turn the engine he would have done so. Davis testifies that such request was never made of the operator, and Davis is the only person who remained in the office during the time the conversation was going on over the wires. It appears from Holloway's own testimony that he left the office immediately after he and Davis went there after supper, for the purpose of getting his engine ready, and it is not shown that he ever returned; second, if Holloway had not exhibited such impatience to get away, doubtless the arrangement would have been carried out to hook his engine on the rear of the freight train, which the record shows left Brinkley a short time after this engine and came up to the engine within a very few minutes after it was wrecked; and third, he had a perfect right to demand rest, which Dispatcher Wells says he would have been compelled to have given him, and this would have enabled them to make the trip the next morning by daylight. So that Holloway is

as much responsible, if not more so, for the engine leaving Brinkley that night backing up than anyone else.

This was no more of an emergency than it was that any other train should be run on time and the work performed without delay. In fact, Holloway, notwithstanding the danger, which he appreciated, was the real cause of the rush and his whole conduct shows that he was not very careful about what he did nor how he did it. A striking illustration of this is found in his evidence on page 27 of the transcript:

"Well, we were going down about three and one-half miles this side, or perhaps four and one-half miles this side of Palestine station, and Davis says to me, 'There is a road crossing here some place, but I don't know exactly where it is at,' and I said, 'That is all right, I will get up and ring my bell, and if there is anybody here, they will hear us coming.'"

He was doubtless mad and growing reckless because it was necessary to send this engine back to Hulbert that night.

In the case of Ry. *v.* Davis, 53 Fed, 63, the court said:

"If he voluntarily and unnecessarily places himself in a position that he knows is dangerous, or that an ordinarily prudent man in his position would know was dangerous, and is thereby injured, when there are other positions that he might take in the discharge of his duty that are safe, he cannot recover of the defendant, although the latter is in some degree negligent He cannot recklessly and unnecessarily expose himself to a known danger, and then recover for an injury to which such exposure contributed."

This doctrine was reiterated and reinforced by many citations in Union Pacific Ry. Co. *v.* Jarvi, 53 Fed. Rep., 68.

In the case of Lothrop *v.* Fitchburg R. R., 150 Mass., 424, the court said:

"The general rule of law is, that when the danger is obvious, and is of such a nature that it can be appreciated

and understood by the servant as well as by the master, or by anyone else, and, when the servant has as good an opportunity as the master or anyone else of seeing what the danger is, and is permitted to do his work in his own way, and can avoid the danger by the exercise of reasonable care, the servant cannot recover against the master for injuries received in consequence of the condition of things which constituted the danger. If the servant is injured, it is from his own want of care."

In Gowen *v.* Harley, 56 Fed., 983, this court said:

"Where there is a natural and safe method of performing his service, and the servant carelessly pursues a method that is obviously more dangerous, he is guilty of contributory negligence and cannot recover."

In Motey *v.* Pickle Marble & Granite Co., 74 Fed., 157, the court said:

"If the negligence of the servant is one of the proximate causes of his injury; if his own negligence contributed to the unfortunate result, he cannot recover of his master, even though the negligence of the master also contributed to it."

We do not deem it worth while to extend the discussion along these lines. We think that these facts and these authorities clearly established such a case of contributory negligence on the part of Holloway as would have justified the court in taking the case from the jury on that ground. But if we are mistaken in this, we certainly cannot be mistaken in the proposition that there was at least enough negligence shown to have submitted the question of contributory negligence to the jury, notwithstanding any negligence on the part of the railroad company, and notwithstanding any knowledge which Holloway might or might not have had as to the alleged negligence of the railroad company.

His own statements repeatedly made that he did not make the slightest effort to see whether the engine had brakes

because he had "no business to look," and did not have any right to inspect the engine, make him guilty of contributory negligence. An inspection was not required. A casual glance was all that was necessary.

III.

We next invite the court's attention to the sixteenth and seventeenth assignments of error, which we may properly consider together. The instructions there asked undoubtedly enunciated correct principles of law as applied to this case. The proof shows that this was at least a hazardous undertaking. It shows further that Holloway had been informed of the defective condition of this engine in many respects, and that it was being sent into the shops for a general overhauling. He certainly could not, under these circumstances, have relied in any respect upon the safety of the machinery to protect him, and knowing that the engine was in bad condition, a greater degree of diligence was required of him in regard to the inspection of this engine before leaving Brinkley and the use of it on the trip than would have been required on an ordinary trip with an engine which he had a right to suppose was in good condition.

Bailey, in his work on Master's Liability for Injuries to Servant, p. 169, says:

"So, when the servant uses machinery known to be defective, he is bound to use special precautions, and if he fails to do so, and is injured, he cannot charge the master with liability."

In Motey *v.* Pickle Marble & Granite Co., 74 Fed., 157, this court said:

"It is the duty of the servant to exercise that degree of care commensurate with the character of his occupation and *the occasion*, which a reasonably prudent person would employ under like circumstances, in order to protect himself from injury, and if he fails to exercise that care, he cannot recover of the master for an injury to which his own negligence has contributed."

Not only that, but rule 200, hereinbefore referred to, required him to examine the machinery he was to use and see that it was reasonably safe for the purposes for which it was intended.

The record shows *that Holloway willfully disregarded* this duty which was imposed upon him. On page 29 of the transcript he says, under the books of rules I was working under, I was compelled to do my duty as a fireman.

On page 30 of the transcript, he testified:

"Q. Did you know that the engine had no brakes on it when you were ordered to go back with it?
A. No, sir, *I have no right to inspect an engine*; I am no engine inspector; I am a locomotive fireman."

On page 37 of the transcript, he testified:

"Q. When you are firing what do you look after?
A. I look after my coal, water and lights.
Q. You don't look at anything?
A. I have got no business knowing any machinery at all, because I am not an engine inspector."

He cannot claim that the company has been derelict in any duty towards him where he displays such willful disregard of the reasonable requirements which both the rules of the company and the general principles of law imposed upon him, and especially in a case where he was put upon notice of the fact that it was, above all things, in this par-

ticular case, very important that he should be very careful and very observant.

These instructions were highly important, and especially so, in view of the instruction given in the twenty-second assignment of error, in which the court said:

"In this connection, I want to say to you also that a fireman need not examine an engine or locomotive furnished him by the company to ascertain whether it is reasonably safe."

And again in the sixth assignment of error in which the court used the expression "without hunting for it."

As applied to the facts in this case, the instructions given were directly contrary to rule 200 of the company, and also to the authorities quoted above.

In Patton *v.* T. & P. Ry. Co., 1 Sup. Ct. Rep. Cas., 275, 20 A. & E. R. R. Cas. (N. S.), 53, the court said:

"He is bound to take reasonable care and make reasonable effort; and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him. Reasonable care becomes, then, a demand of higher supremacy; and yet, in all cases, it is a question of the reasonableness of the care; reasonableness depending upon the danger attending the places or the machinery."

IV.

We next call the court's attention to the eighteenth, nineteenth and twenty-second assignments of error.

In the instructions contained in each of the said assignments of error, the court instructed the jury that the law requires railroads to furnish its employees working tools which are reasonably safe and a place to work in which is

reasonably safe. The court fell into the same error in the instruction set out in the fifth assignment of error.

The duty the master owes to his servants is not to furnish machinery in a reasonably safe condition, but only to use reasonable or ordinary care to furnish machinery in a reasonably safe condition. This is the law everywhere and this precise question was raised in the case of L. & N. R. R. Co. *v.* Johnson, 81 Fed., 680, and the case was reversed and remanded for a new trial. The court there said:

"In respect to the duty of the railroad company the court erroneously instructed that the company 'undertook to furnish the plaintiff a reasonably safe place to work,' and to maintain the same. The instruction in full appears in the margin. The rule is well settled, and as early as 1894, in Railroad Co. *v.* Meyers, 24 U. S. App., 295, 11 C. C. A., 439, and 63 Fed., 793, had been declared by this court, that 'the master's duty requires him to exercise ordinary and reasonable care, having regard to the hazards of the service, to furnish his servants with reasonably safe appliances, machinery, tools, and working places, and also to exercise ordinary and reasonable care at all times to keep them in a reasonably safe condition of repair.' See, also, same case on second appeal, 46 U. S. App., 226, 22 C. C. A., 268, and 76 Fed., 443. In this case the question whether the railroad company was chargeable with negligence was, to say the least, close, depending upon the inquiry whether the space between the rail and board had become, or perhaps was by construction, of such unnecessary width as not to be reasonably safe, and whether the fact was so manifest and so long continued that in the exercise of due care the company ought to have discovered the defect in time to remove it. The error is emphasized by the terms in which the instruction concludes: 'If, while exercising reasonable care, his injury was brought about by the failure of the company to provide a reasonably safe place for him to do his work, the company is liable. That is the very crucial question for you to decide in this case.' It was, therefore, the more important that an accurate definition and explanation of the company's duty should have been given to the jury. The error was not corrected by other portions of the charge, which, though implying the true rule, were

not sufficient to prevent misunderstanding on the part of the jury. For instance, the jury were told that if they found that the defendant failed or neglected to keep its track at the place of the injury in a reasonably safe condition, and such condition was known to the defendant, or by the exercise of reasonable diligence could have been known to the defendant, etc., they should find the defendant guilty. In so far as this indicates that the defendant was bound only to ordinary diligence to discover defects caused by use, it is perhaps sufficiently accurate; but the repeated and erroneous statement of the primary duty to provide a safe working place, was left unmodified and unexplained. When it is proposed by a further instruction to correct an erroneous charge, the purpose should be stated, and the explanations made so clear as to leave no room for reasonable mistake."

In the case of R. R. Co. *v.* Needham, 69 Fed., 823, this court (quoting from the syllabus) said:

"The extent of the duty of the master to the servant in the matter of place of service is to exercise ordinary care to furnish him a reasonably safe place and to use ordinary care and diligence to keep it in a reasonably safe condition, and it is error for the court to charge the jury that it is the master's duty to furnish the servant a reasonably safe place. This court has repeatedly so held."

Bailey, in his work on Master's Liability for Injuries to Servant, pages 2 and 3, says:

"Among the implied obligations resting upon the master are, first, that he shall provide suitable means and appliances to enable the servant to do his work as safely as the hazards incident to the employment will permit. In the performance of these duties the master is bound to the exercise of reasonable and ordinary care, and such only."

In the foot-note to the text he gives a long list of authorities supporting that position.

The defendant in error may attempt to get around this error by saying that it was practically admitted by the plaintiff in error that this engine was not in a reasonably safe con-

dition, but it must not be forgotten that every particle of the evidence as to the defective condition of this engine comes from Holloway himself, and that his knowledge was derived from the traveling engineer at the time he accepted service on the engine. Holloway's claim is, that he knew of the other defects in the engine, but he did not know that there were no brakes upon the driving wheels which we now understand he claims was a defect. By the allegations of his own complaint it shows that such brakes as there were on the engine were in a first-class condition and worked well. In fact, it seems that the brakes were about the only thing that were in good condition. Now, the very same admission which he claims that we made with reference to the condition of the engine was only to such parts of it as he was fully advised. If he was advised as to the condition of the engine, then he assumed the risk, and the instruction was abstract and calculated to mislead the jury in respect to the risk assumed by the defendant in error and in respect to the duty which the plaintiff in error owed him on account of the known defective condition of the engine. We insist and maintain that the brakes were in good condition and that no negligence of any kind was shown in respect thereto, and we hold that there is nothing in the record to show that it was negligence to use or operate an engine of this kind engaged in this work which did not have brakes on the driving wheels. The same process of reasoning that will make this a harmless error on the part of the court must necessarily make Holloway assume the risk. If Holloway seeks to avoid the risk assumed, then we invoke the rules of law required to establish negligence and the presumptions obtaining in our favor. If it is said the error

was harmless, Holloway assumes the risk. If he did not assume the risk, the error is prejudicial.

Furthermore, it seems to us that there is a direct conflict in the instructions of the court, in this: In the instructions he gave the jury when they were sent to inspect the engine, he said:

"A man cannot shut his eyes and say he did not want to see anything which a reasonable man could not help but see if he kept his eyes open."

And in the instruction contained in the twenty-second assignment of error, this occurs:

"In this connection, I want to say to you also that a fireman need not examine an engine or locomotive furnished him by the company to ascertain whether it is reasonably safe."

Under the evidence in this case, these statements cannot be reconciled and do not state the issue involved. The servant has no right to rest upon any presumption as to machinery openly used where he has as good an opportunity as the master to observe the kind of machinery furnished him and which is openly used.

V.

The court erred in that part of its instruction set out in the twentieth assignment of error, for the reason that it assumes, and in effect declares, as a matter of law, that the running of this engine backward without any brakes upon the driving wheels was negligence on the part of the railroad company.

It is also erroneous in this, that it requires the jury to eliminate any question of contributory negligence and only submits the question of assumed risks upon condition that

the jury first find that Holloway had no knowledge of the fact that there were no brakes on the driving wheels of the engine.

For a fuller discussion see our remarks, *supra,* on questions of contributory negligence and assumed risk.

VI.

The court erred in that part of its charge contained in the twenty-first assignment of error, because we think that the court should have told the jury, as a matter of law, that Holloway was presumed to have knowledge of the absence of the brakes. It also eliminated any question of contributory negligence.

VII.

The court erred in that part of its instruction contained in the twenty-third specification of error, for the reason that we do not think that there was any substantial conflict in the evidence on the question to which it referred, for the reasons mentioned, *supra.*

VIII.

The court erred in giving that part of its charge set out in the twenty-fourth specification of error, for the reasons heretofore given, in connection with what we have had to say on the proximate cause of the injury and the question of contributory negligence and assumed risk.

IX.

We will next consider the fourth, fifth, seventh and eighth assignments of error together. It was agreed between the parties, that the jury might wiew an engine exactly like the one on which the plaintiff was at the time of the accident.

Pictures of the engine viewed, taken both from the engineer's and fireman's sides, are made a part of the record and found on pages 95 and 96.

These errors occurred in the instruction of the court to the jury when sent to view the engine. The whole charge is found on pages 92, 93 and 94 of the record.

The court erred in undertaking to tell the jury what methods they should adopt in determining whether the fireman could discover the presence or absence of the brakes upon the engine. The jury should have been left entirely free in this respect.

The court erred in instructing the jury that it was not the duty of the fireman *to look over and examine it.* The law does require servants to use their eyes as to the kind of machinery openly used and to observe all patent defects, if there are any. If the absence of brakes upon the engine in this case can be considered a defect, this instruction was particularly improper, in view of the fact that it was a patent defect and in view of the information which Holloway had received from the traveling engineer in regard to this engine at Hulbert.

The court also erred in stating the duty of the master to the servant in furnishing machinery. The court of appeals held that this was an "unquestionable error."

The court of appeals also held, in effect, that the instruction to the jury "to go inside and try to put themselves only in the same place that a fireman would naturally occupy, and then, occupying that place, to determine whether the wheels of the engine, on which the brakes would be, could be seen from there without looking for them while a

man was employed for several hours doing work on an engine as a fireman," was error, but that it was cured by other portions of the charge referred to in its opinion. The court does not tell us how these other portions of the charge cured the error, and we are unable to appreciate the force of the court's argument in this respect. In addition, we do not understand how erroneous portions of a charge can be cured by other portions of the same charge which were, we think, equally as erroneous. All the witnesses on both sides, including Holloway, admitted and stated that the brakes upon an engine occupy a most conspicuous place and are in plain view. The pictures of the engine found in the record also show this, and there is absolutely no room for controversy on this point. This brings us to the real merits of the exceptions to the court's charge, and that is this, that the proper purpose of the view by the jury is not to furnish evidence upon which the verdict is to be founded, but to enable the jury better to understand and apply the evidence which is given in court. The jury could not have understood the charge of the court otherwise than as authorizing them to base their conclusions and findings entirely upon what they saw, regardless of whether it was supported by any sworn testimony or not, and, in fact, the court told the jury the view taken was a part of the evidence. This, we submit, was not proper.

In the case of Railroad v. Bowen, 40 Ind., 548, the court said:

"In Close v. Samm, 27 Iowa, 503, this question was under consideration. The district court had instructed the jury that they should consider all the evidence in the case and all the facts and circumstances disclosed on the trial,

including their personal examination, etc. The question was presented to the supreme court whether this instruction was correct or not, and under a statute similar to our section found in the civil code, the court said: 'The question then arises as to the purpose and intent of this statute. It seems to us that it was to enable the jury, by the view of the premises or place, to better understand and comprehend the testimony of the witnesses respecting the same, and thereby to more intelligently apply the testimony to the issues on trial before them, and not to make them silent witnesses in the case, burdened with testimony unknown to both parties and in respect to which no opportunity for cross examination or correction of error, if any, could be afforded either party. If they are thus permitted to include their personal examination, how could a court ever properly set aside their verdict as being against the evidence, or even refuse to set aside without knowing the facts ascertained by such personal examination by the jury. It is a general rule certainly, if not universal, that the jury must base their verdict upon the evidence delivered to them in open court and they may not take into consideration facts known to them personally, but outside of the evidence introduced before them in court. If a party would avail himself of the facts known to a juror he must have him sworn and examined as other witnesses.'"

Attached to the case of People v. Thorn, 42 L. R. A., 385, is a very exhaustive and complete brief as to the nature and effect of the view by the jury and the different theories relating thereto, and also some suggested explanations of apparent conflicts.

In the case of Benton v. State, 30 Ark., p. 328, the court said:

"The jury is merely to be conducted to and shown the place to be viewed and the view is made by the jurors *to enable them the better to understand the testimony given by the witnesses,* but though no witnesses are examined at the view, yet the jurors, from their observation of the place and it surroundings, may receive a kind of evidence from mute things, which cannot be brought into court to confront the accused, and are in their nature incapable of cross examination."

For additional list of authorities holding that the view of the *locus in quo* by the jury has no independent probative force, but is allowed merely to enable the jury to better understand and apply the sworn testimony in the case, see

A. & E. Ency. of Law, 2nd Ed., Vol. 11, 540, Note 3.

This case is not analogous to the cases of McReynolds v. R. R. Co., 14 A. & E. R. R. Cas., 172, and R. R. Co. v. Hopkins, 90 Ill., 323, cited by the court of appeals, which were for damages to real estate, where the premises themselves could be viewed. In the case at bar the jury could not, and did not, view the premises. They merely viewed an engine of the same type as the engine upon which the defendant in error was injured. If it were competent at all for them to obtain evidence by a view of the premises in this case, it could only have been done by affording them the same opportunity and experience as fireman upon this engine as Holloway had. Even, then, the test would not have been accurate, because Holloway was a man of experience in railroading, and this was an element for consideration also. As an illustration of the inapplicability of such cases as R. R. v. Hopkins, *supra,* the same court in the case of Vane v. Evanston, 150 Ill., p. 624, said:

"It seems clear, therefore, from the authorities, that the only purpose of permitting the jury to inspect and view the *locus in quo* is to better enable them to understand the matter in controversy between the parties, and to clear up any obscurity that may exist in the application of the evidence introduced in the cause. The eminent domain act declares that the jury shall, in condemnation cases, at the request of either party, go up on the land (Rev. Stat.,

Chap. 47, Sec. 9), and we have repeatedly held that the information derived by the jury from their personal view and inspection of the premises is to be considered by them, in connection with the other evidence in the case. Such was not the rule at common law, the purpose of the view being, as stated, simply to enable the jury to understand the issue, and apply the evidence. They were not authorized to consider any fact bearing upon the merits of the controversy derived from such view. To allow that to be done would be wholly inconsistent with the principles controlling in common law trials, and introduce great uncertainty in the trial of all common law causes, where a personal view was permitted. Parties never would know upon what the jury based their finding, and the court would be in no position to control the evidence upon which it is predicated, or determine whether the verdict was based upon competent or upon the condition of incompetent and illegal matters not admissible under the issues."

In charging the jury in the case of Laflin v. Railroad Co., 33 Fed., p. 424, the court said:

"You have been permitted to view the premises in question. The object of this view was to acquaint you with the physical situation, condition and surroundings of the premises and to enable you better to understand the evidence on the trial. The knowledge which you acquire by the view may be used by you in determining the weight of conflicting testimony respecting value and damage, but no further. Your final conclusion must rest on the evidence here adduced."

The court of appeals in the syllabus prepared by it announces the doctrine that the court may not reverse a judgment because there was no evidence to support a finding of fact by the jury based upon testimony and an ocular inspection of machinery, a knowledge of the defects in which is in issue, because the evidence derived from the inspection is not, and cannot, be presented to the appellate court for consideration. But this is not the doctrine, even in jurisdictions where it seems to be held that a view does afford

some evidence, and a contrary doctrine was announced by the Supreme Court of Massachusetts in the case of Tully v. Fitchburg Railroad, 134 Mass., p. 503. The court said:

"In many cases, and, perhaps, in most, except those for the assessment of damages, a view is allowed for the purpose of enabling the jury better to understand and apply the evidence which is given in court; but it is not necessarily limited to this; and, in most cases of a view, a jury must of necessity acquire a certain amount of information, which they may properly treat as evidence in the case. Parks v. Boston, 15 Pick., 198. Though the knowledge acquired by a jury from a view may be such, in some cases, as to embarrass a court in passing upon the question of the sufficiency of the evidence to warrant a verdict for the plaintiff, or upon a motion for a new trial, for the reason that the verdict is against the evidence, or that the damages are excessive, yet a judge must, in each case, determine from the circumstances of that case, whether he is so far in possession of all the material evidence as to enable him to act intelligently. The fact that the jury have had a view presents no insuperable obstacle to the granting a new trial, on the ground that the verdict is against the evidence, or the damages excessive. Harding v. Medway, 10 Met., 465; Fitchburg Railroad v. Eastern Railroad, 6 Allen, 98."

X.

The court erred in his instruction set out in the twenty-fifth assignment of error, for the reason as shown by the evidence of Dr. Runyan, that the company had provided a place to take care of all persons injured while in the employ of the defendant, and we maintain that unless plaintiff could show that the company had not furnished competent physicians and proper medical attention, that he could not incur other medical attention at the expense of the company. In other words, he knew that they were prepared to take care of him, and he must accept the medical attention there provided unless he can show some good reason for not doing it. The servant is bound to lessen the damage for which the master may be liable to him.

XI.

The court erred in that part of his charge set out in the twenty-sixth specification of error, for the reason that there was no proof to show that the plaintiff could not earn as much after the injury as he could before nor to what extent his earning capacity has been impaired.

XII.

The opinion of the court of appeals.

The court, in its opinion (R., pp. 117-126), says that the lower court committed an unquestionable error in instructing the jury that it was the duty of the company to furnish its servants with reasonably safe machinery and a reasonably safe working place, but held that the error was not prejudicial, because, as a matter of law, the company was negligent in failing to provide its engines with brakes. It then proceeded to state some exceptions to the doctrine announced in the following language:

"There may be, and probably are, circumstances under which the absence of a brake from an operating engine would not constitute want of reasonable care to provide a reasonably safe locomotive for the purposes to which its use is applied. This may be true of an engine employed in a yard for switching purposes. It might be true under any circumstances which could be shown by evidence, but in the case at bar, the defective engine was a road engine employed in the usual service of moving loaded trains along the railroad. There was no evidence of any circumstances tending to excuse the failure to supply it with the ordinary appliances used to control the movements of such engines."

These remarks show conclusively that the court, in deciding this case (1) overlooked some very important facts disclosed by the evidence and (2) based their decision upon some facts not to be found in the record.

In the first place we wish to inquire where the evidence can be found to support the statement that "the defective engine was a road engine employed in the usual service of moving loaded trains along the railroad." We are unable to find any evidence to this effect in the record. On the contrary, it is shown affirmatively by the plaintiff himself that it was a switch engine, for on page 44 he says:

"We had orders to take Engine 3, W. & B., to Hulbert backwards, and this engine was headed west and had a headlight on the front end. She had been *used as a switch engine, and did not have a pilot on either end* and no headlight on the back end of the engine going east when backing up."

And that at the time of the injury it was being used in a dirt pit at Hulbert for getting out dirt and was only on the road on this occasion because it had been ordered sent to the company's shops at Little Rock for general repairs and had been turned back at Brinkley because of the failure of another engine in the dirt pit at Hulbert. (See testimony of plaintiff, R., p. 46; testimony of Will Barger, R., p. 57, and testimony of E. M. Roberts, R., pp. 68 and 69.)

How any other conclusion can be reached than that the evidence in this case clearly brings this engine within the exceptions stated by the court is inconceivable.

In the second place, we wish to inquire where the evidence can be found in this record to support the assumption of the court of the "absence of a brake" upon this engine. Notwithstanding the fact that the plaintiff himself testified (R., p. 21) that "it was a regular old scrap pile we were on, any way," of which fact he was fully apprised before the accident happened, yet the evidence does show affirmatively, without contradiction, that this engine was equipped with

brakes attached to the wheels of the tender, which were in first-class condition and in perfect working order at the time of the injury.

It seems clear, therefore, that the opinion of the court as to the negligence in this case is based upon facts which do not exist.

Now, let us take the conclusion of the court in its broadest significance, and that is, that the failure to provide an ordinary road engine with brakes, in the absence of evidence excusing it, is, as a matter of law, conclusive evidence of a want of reasonable care to provide a reasonably safe locomotive engine to operate upon a railroad, and see whether the conclusion of the court is sustained by the law and the reason of the case. In the first place, it is shown by the testimony of Roberts that this engine had been operated without any brakes by the White and Black River Railroad, another railway company of which he had been master mechanic. The presumption is, until the contrary is shown, that Roberts was a man of ordinary prudence and that the White and Black River Railroad Company conducted its business with ordinary care. But it appears that about a year before the Choctaw Company leased the White and Black River road Roberts had equipped the engine in question with brakes attached to the wheels of the tank or tender, and that at the time of the accident to Holloway these brakes were in first-class condition. Now, the court in taking judicial knowledge of facts can only take knowledge of such facts as absolutely exist. They cannot take knowledge of facts that do not exist. The photographs of the engine viewed in this case show that while the driving wheels were equipped with brakes, the tender had

no brakes whatever. The engine upon which Holloway was injured was equipped with brakes in good working order upon the wheels of the tender, but had no brakes upon the driving wheels of the engine. It is a well known fact, that for all practical purposes, the tender is but a component part of the engine, and anything that will operate to check or stop the tender will operate with the same effect upon the engine, so that, in fact, the engine in question was actually equipped with brakes. The only question that could be raised was as to whether or not the brakes were sufficient in number and were in the proper place on the engine. Now, will this court take judicial knowledge of the fact that in October, 1900, railroads in this country generally equipped their engines with brakes, both upon the driving wheels and upon the wheels of the tender. If it does, it will assume knowledge of a fact that did not, in fact, exist. If the court will not take such judicial knowledge, then will the court take judicial knowledge of the fact that it is safer or better to have them upon the driving wheels or upon the wheels of the tender. If the court takes judicial knowledge of how engines are equipped for the purpose of making quick stops and avoiding accidents, they must also take judicial knowledge of the equipment and appliances of the train as well. A certain percentage of the cars in all freight trains are equipped with air brakes. As to passenger trains it is generally true that all of the cars are equipped with brakes. This braking power upon the cars is used quite as much, and is quite as effective in stopping trains as the brakes upon the engine. The brakes on all cars are handled from the engine by the engineer just the same as the brakes upon the engine.

It is not necessary that all the cars on freight trains should be equipped with brakes, because sufficient braking power can be obtained from the brakes of a certain percentage of the cars to handle the train with safety and reasonable care. The deficiency in the braking power of an engine, if there is a deficiency, can be supplied by using a larger percentage of the braking power in the cars of the train. If the engine has no braking power, then the entire deficiency may be effectively supplied by using a sufficient number of cars equipped with brakes. So, then, it is entirely possible to safely and successfully operate a train without having a pound of braking power upon the engine. Now, if the engine in question is defective as to braking power, is the court going to assume that the company will use it in handling a train of cars without sufficient braking power on the train? Not only is this true, but for the purpose of making short and effective stops, it is preferable to use the braking power on the train to that on the engine, for the reason that wheels of the engine can be reversed and put in what is commonly known in railroad parlance as the "backward motion," which gives us not only the effect of the brakes upon the train but the full retarding power of the engine when reversed, which is more than could be gotten if the brakes on the driving wheels were used. It would not be possible to obtain this if the driving brakes were used. Repeated experiments have clearly demonstrated that the best and most effective way to make a safe and short stop is to apply the brakes to the cars and not to the wheels of the engine. The reason for that is, that the engine has only a braking power of about seventy-five per cent of the weight

of the drivers alone. This, taken when the apparatus is in perfect working order. While with the engine not equipped with driver brakes, the engine may be reversed, and full steam power applied, with which you could get one hundred per cent of the weight of the engine to act as a retarding force. Therefore, to get the best results in stopping a train consisting of engine and cars quickly, or even a light engine with brakes upon the tender, the surest stop can be made by applying the tender brakes, reversing the engine and giving sufficient steam, so that the engine will exert its full power as a retarding force. In making a quick stop, if the driver brakes are used, it frequently happens that the engine locks and the wheels slide on the rails. This is especially true if the rails are damp or frosty. This destroys the retarding effect of the engine to a great extent, as has been proven by many experiments, and by many experienced engineers it is maintained that the driving brakes should never be used in cases of this kind. So, then, to illustrate this particular case: The proper and shortest way to make an effectual stop was to apply the brakes to the tender, which was done, and reverse the engine so as to get the retarding effect of the driving wheels, which is not shown to have been done. As the evidence shows this to have been a damp night, it is likely that if the engine had been supplied with driving brakes and those brakes had been applied, the effect would have been to have caused the engine to glide along the rails, losing the entire retarding force of the drivers and the stop could not have been made as quickly with them as without.

We are justified in going outside of the record in making this argument because the opinion of the court of appeals is

based upon a supposed general custom not shown by the record.

The court of appeals, in its opinion, says it might be true "under many circumstances, which could be shown by evidence" that the failure to equip an engine with brakes would not be negligence, and adds: "There was no evidence of any circumstances tending to excuse the failure to supply it with the ordinary appliances used to control the movements of such engines." If the use of this engine was consistent, under any circumstances, the presumption is that it was consistent, in this case, and it was not incumbent on defendant to explain anything, until plaintiff had overcome this presumption by positive proof to the contrary, which, we submit, was not done.

St. L., I. M. & So. Ry. v. Gaines, 46 Ark., 555.

Patton v. T. & P. Ry. Co., 179 U. S., 658.

Witnesses for plaintiff testified that this engine, equipped with brakes on both the drivers and the tender, and running at the rate of six to eight miles an hour, would run 60 to 90 feet before stopping, after the brakes were applied. (See testimony of Barger, Tr., p. 83; Farrell, Tr., p. 84.)

Witnesses for defendant testified (See testimony of Roberts, Tr., p. 67; Welch, Tr., p. 70) that running at the same rate of speed, this engine, equipped as it was, could have been stopped within 35 to 50 feet. To have done this, however, the engine should have been reversed, as explained above, which it does not appear was done. If the testimony of defendant's witnesses were true, and they were entitled to as much credence as witnesses for plaintiff, then this was a

better engine than plaintiff contends he should have had. Certainly, this was a question which should have been submitted to the jury.

This brief could be extended to an unreasonable length by a consideration of other similar questions in connection with the equipment and handling of trains and engines, but the foregoing, we think, is sufficient to demonstrate clearly that the court was not warranted, either by law or the reason of the case, in its conclusion that the company was guilty of negligence *per se* in respect to this engine. The court has, indeed, entered upon a wide field and its opinion is a dangerous precedent, and if the principles announced are sustained by this court it will unquestionably prove a source of annoyance and embarrassment to the courts and set at naught long and well established principles of the law of negligence relating to master and servant.

Logging Co. v. Schneider, 74 Fed., 200.

The court seems to have laid some stress upon the statement of the plaintiff that he had never worked upon an engine before which was not properly equipped with brakes. This information was elicited by a leading question from plaintiff's counsel and proves nothing. It is a little remarkable that he should know how all other engines upon which he had worked were equipped and know nothing about this particular engine. In his original complaint, he alleged that this engine had brakes upon the driving wheels, but that they were in a defective condition, and in spite of the admission in the answer that there were no brakes upon the driving wheels of the engine, he still swore at the trial that immediately after the accident he examined the engine and it had

the braking apparatus attached, but the shoes were defective and would not clasp. His statement is very general, is a legal conclusion, does not show how many engines he had worked upon, whether they traveled over mountains or upon level ground, nor to what purpose they were put, and is, in any event, insufficient to establish, as a matter of law, negligence on the part of the defendant in respect to this engine.

Replying to the conclusion of the court that it was negligence *per se* to operate an engine equipped as to brakes as this one was upon its road in the usual service of moving loaded trains, we answer that this accident did not happen while such engine was being so used.

The court having reached the conclusion, as a matter of law, that the company had failed to exercise ordinary and reasonable care in respect to this engine, also reached the conclusion, as a matter of law, that the accident was the natural and probable consequence of such negligence. But we submit that this was a question which should also have gone to the jury. This is especially true in this case, because Engineer Davis testified, in response to a question asked by plaintiff's counsel, as follows (R., p. 15): "Q. Is the road fenced at the point along where the accident occurred? A. Yes, I think it was." On cross examination, he testified (R., p. 76): "Q. Are you positive that the track was fenced at the point where the accident occurred? A. I had passed there many times before and do not remember of seeing any place along there that was not fenced." This evidence is uncontradicted, and a consideration of the same by the jury was important from two aspects:

First. The company having fenced its right of way for the purpose of keeping stock off of its tracks, we submit that it was not proper for the court to say, as a matter of law, that the collision with this horse was the natural and probable consequence, but that it was a question for the jury.

Second. The court, in its opinion, says that "the purpose of the exercise of this care is to prevent accidents and collisions." Does the court mean to say that the company is limited to the adoption of any particular method or way of preventing "accidents and collisions?" If, instead of equipping this engine with brakes in the manner which the court held that it should have done for the purpose of preventing collisions, it saw fit to fence its road and in that way prevent the happening of the very thing which the court says the brake was also designed to prevent, then we ask was it proper for the court to say, as a matter of law, that the company had not exercised ordinary care to prevent this collision, or was it proper for the court to submit this question to the jury as a question of fact to be determined by them. We submit that the latter was the only proper course.

These two important questions of fact should have been submitted, under proper instructions, to the jury. In view of these two important questions of fact, it is not easy to understand how the circuit court of appeals could hold that the "patent and unquestionable" error of the circuit court in repeatedly instructing the jury that it was the duty of the company to furnish its servants with reasonably safe machinery and a reasonably safe working place was error without prejudice.

The court, in its opinion, says that the servant is not required to search for latent defects or hidden dangers, but it is his duty to exercise reasonable care to observe and be cognizant of all obvious defects in the machinery and appliances with which he is working. Just how it can properly be left to the jury to say in this case whether or not the plaintiff has knowledge of the fact that there was no brakes upon the engine is hard to understand. The plaintiff was a skilled and experienced railroad man. Every witness, without exception, testified that the brakes occupy a most conspicuous position. The photographs in evidence show this. If the lack of brakes was a defect, the defect was neither latent nor hidden. Therefore, no duty rested upon the company with respect to pointing out this defect. The plaintiff himself says he could have seen it if he had looked. The law says he must look, and if he does not choose to look the law will say that he had notice.

In the case of Stewart v. Seaboard Air Line, 41 S. E., p. 981, the court said:

"If there was anything visibly wrong about the brakes on the day in question, it could have been discovered by the plaintiff as well as by the defendant, and if both the defendant and the plaintiff had equal opportunities of discovering this patent defect in the appliances on the day the accident occurred, then the defendant would not be liable for an injury resulting therefrom" (citing cases).

See also:

I. & G. N. R. R. v. Story, 62 S. W., 130.

Detroit Crude Oil Co. v. Grable, 94 Fed., 80.

Brooks v. Northern Pacific Ry. Co., 47 Fed., 687.

But let us consider the case from the standpoint of the more liberal rule adopted by the court that he was only

required to "exercise reasonable diligence to observe and be cognizant of all obvious defects in the machinery and appliances with which he was working." Clearly, if he had not exercised reasonable diligence to observe and be cognizant of all obvious defects, then he would be guilty of negligence, and yet the trial court refused to submit any question of contributory negligence to the jury. Referring to the evidence of the plaintiff to which we have already called the court's attention, we submit that it demonstrates clearly that the plaintiff not only did not exercise reasonable care, but no care whatever, with reference to observing. Plaintiff continually took the position in his evidence that it was no business of his to know anything about the machinery at all. If his evidence, in connection with the evidence of the other witnesses, did not warrant the court in saying, as a mater of law, that he had knowledge of the defect, it was certainly sufficient to require the question of whether he had used the ordinary care required of him in this respect to be submitted to the jury. In addition to this, the plaintiff knew and had been furnished with a book of the rules of the company (R., pp. 49, 50 and 51) and seemed to be familiar with the same (R., p. 29). Rule 200 (R., p. 92) is as follows:

"Every person accepting a position with this company does so with a full knowledge of the dangers incident to the operating of railroads and is required to exercise great care in the performance of said duty to prevent accident to himself and others, and to see that the machinery or tools which he is to use are in safe condition to perform the services required, and to report defects as per Rule 203."

This rule was reasonable. No question of fact is presented as to whether the plaintiff even tried to comply with it, for we find his evidence full of such expressions as

"perfectly plain" (R., p. 38), "I never inspected it at all" (R., p. 32), "I have got no business knowing any machinery at all" (R., p. 37). In fact, he seems to take great satisfaction in the fact that he closed his eyes completely to what could have been seen by the most casual look. He was guilty of negligence as a matter of law.

L. & N. R. R. v. Pearson, 97 Ala., 218, 219.

We respectfully submit that a careful reading of the record in this case will establish the fact that the plaintiff in error has not had a fair trial.

EDWARD B. PEIRCE,

Attorney for Plaintiff in Error.